Mysore

NO. 2- DE. 15-1-1949

HD

[redacted]

ADVOCATE GENERAL'S OPINIONS.

1911E

No. 2/15-1-1949.

O P I N I O N.

K. Rajah Iyer (A.G.) My answer to the points referred to is as follows:--

(1) Section 154 of the Government of India Act, 1935, does not nexempt the transactions by the departments of Government of India from liability to tax under the provisions of the Madras General Sales Tax Act of 1939, if the transactions can properly be treated as amounting to carrying on the business of buying and selling goods. Section 154 prohibits taxation only in respect of property as such, but where the tax is levied not on the property but on the turnover of a business carried on, though with the aid of such property, the exemption under the section does not avail;

I am not sure, however, that the transactions or operations of the departments of the Government of India referred to in the report of the Boards of Revenue can, in all cases, be treated as carrying on business, e.g., sale of unclaimed perishables or old and unserviceable articles by the Railway department may not be regarded as in the course of a trade or business. It may on the other hand to that sale of grocery, rice, grains, etc., is in the nature of business. Somilarly the sale by the post and Telegraphs Department of old telegraph posts, etc. may not be in the course of trade or business, whereas sale of quinine may be treated as carrying on business.

I am not going into greater detail into this question at this stage except incidentally, because the question directly referred to me is with reference to the scope of section 154.

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(2) I do not think there is any force in the argument that independently of section 154 of the Government of India Act, the Crown is not bound by the Madras General Sales Tax Act of 1939. Though there is no specific section in the Act vesting all property in the Crown, the underlying assumption no doubt is that all property is vested in the Crown. At the same time sections 154 and 155 read with section 172 makes it clear that under the Government of India Act, there is no general immunity of grown property from all taxation. If there were any such immunity, section 154 would be unnecessary and meaningless and equally so, section 155. Under section 172, property vests in the Crown for Government of the Federation or for Government of the Provinces. But in either case, the vesting is in the Crown. Nevertheless, it has been considered necessary to enact sections 154 and 155, which grant and define the scope of the exemption from tax of property held by the Crown for Federation or the Province as the case may be. The Crown has thus surrendered its immunity or prerogative by assenting to the provisions contained in sections 154 and 155 of the Act.

Sub: Tax - The Madras General Sales Tax Act, 1939 Sales by the Departments of the Government of India - Liability to tax.

Ref: Memorandum No. 30557 N48-2 dated 13th July, 1948, Revenue Department.

No. 3/15-1-1949.

O P I N I O N.

K. Rajan Iyer (A.G.) I am of opinion That h the provincial Government has no power to reduce or abolish special pay drawn by officers appointed by the Secretary of State in the first two classes of cases mentioned in the reference, namely, (1) an officer who holds a Reserved Post to which special pay was attached prior to 15th August 1947 and (2) an officer who held a post other than a Reserved Post prior to 15th August 1947 to wh'ch a special pay was attached and who continues to held such post.

Section 10(2) of the Independence Act entitles the officers to "the same conditions of service as respects remuneration, etc., or rights as similar thereto as changed circumstances may permit as that person was entitled to immediately before the appointed day." This means that if a particular service or post was carrying a particular salary or remuneration, a person occupying such post is entitled to get the same salary or remuneration. Remuneration has by section 19(4) of the Act been defined to include allowances; and it will not be doing violence to the language to regard special pay as an allowance. The only question however is whether the clause or right as similar thereto as changed circumstances may permit" does not imply a power to reduce or abolish speical pay. If this clause governs also the provision "the same conditions of service, etc."then it might imply such a power. The prima facie view is that it governs. This interpretation would have been consistent with section 247 as amended in the Government of India Act without the proviso. That section contemplates the remuneration to be fixed by the rules made by the Governor-General; and one might well have argued that the Governor-General could make a rule reducing or abolishing suspended pay on the changed circumstances. In view of

a rule reducing or abolishing special pay in view of the changed circumstances. But the proviso to that section precludes any rule being made so as to operate to the detrimont of any of the officers concerned. In view of the proviso It is not possible to state that ~~xxx~~ even the Governor-General could make a rule reducing or abolishing special pay.

It may be noted that in the two classes of cases, the special pay was attached either because the post was a Reserved post or because though it was not a Reserved post special pay was attached by reason or a rule by the secretary of State then in force. As the post carried that remmuneration under the then rules and the officer held that post on 15-8-1947, section 10(2) of the Independence Act guarantees that same amount. In any case the provincial Government has no power to make any rule under section 247 in regard to remuneration.

The position is however different in regard to claues 3 and 4 mentioned in the reference. When is guaranteed is remuneration attached to the post which an officer was holding prior to 15-8-1947. If the officer did not hold the post on that date, but succeeded to it after 15-8-1947, he cannot claim that no is entitled to the remuneration which the post carried prior to 15-8-47, because section 10(2) only refers to the person holding a particular service on the appointed day. There is ~~xxxx~~ nothing in section 10(2) or the Independence Act or secton 247 or the Government or India Act guaranteeing that every post, whether a particular person hods it or not, would be continued and with the same remunera ion attached to it so that

any person, who comes to hold that office later, may draw the particular salary. The guarantee relates to the actual remuneration drawn by a particular officer occupying a particular post on 15/8/1947. Similarly in regard to class 4, as the post itself was created by the Provincial Government, it is not an office to which he was appointed by the Secretary of State and I do not think that section 10(2) applies to such a case. Therefore, the more fact that the particular post is revived does not mean that any person appointed to that post can claim that he was holding that post on 15-8-1947.

In regard to clausses 3 and 4, threrefore, I am of the opinion that the Provincial Government can reduce or abolish the special pay.

Sub: Special Pays (ClassI) Officers appointed by the Secretary of State and-others Drawal of.
Ref: Letter No. 73747A - Can - 6 dated 9th December, 1948, Finance Department.

No. 9/5-3-40.
"CONFIDENTIAL.

Sri K. Rajah Iyer. I have laready given an opinion in this connexion (Opinion No. 3 dated 9-2-1948) to which I would like to draw attention. Therein I have observed in the last paragraph that there has been some bungling on the part of the local officers concerned, but two further question how arise for consideration, viz., who the bungling official (or more bungling official) was and whether such bungling would amount to actionable negligence or dereliction of duty so as to entail a liability for damages.

In the first place I am unable to say that as between the Conservator and the District Forest Officer, the latter was in the wrong and that the former was in the right. The District Forest Officer was ordered definitely to "obtain the consent of the lessees concerned and report"; and no merely inqure and report as stated in the memorandum. Mr. Sarma obtained the consents and these consents constituted binding contracts. If the Conservator did not intend this result he ought to have used more precise and unambiguous language, and Mr. Sarma cannot be held more responsible or blame worthy than the Conservator himself if he understood the order in a particular way.

I am also of opinion that of neither official can it be said that there has been any breach of duty sufficient to justify mulcting them in damages. Possibly both acted in the best interests of the Government, each in his own way and according to his own lights and capacity and understanding, but unexpected results followed and loss to Government resulted.

In the view which I am taking, I do not know whether it is necessary to deal with the other leagl points which have been raised in the

notice. If the Government should desire me to express an opinion on these questions as well, I shall do so.

Sub: Ananthanarayana Sarma, Mr. A.N., I.F.S., Suit against sex recovery of loss caused by him in thngedu bark loupes.

Ref: Memorandum No. 121003 CI/48-5 dated 9th February 1949, Development Department.

No. 1[illegible].

K. Rajah Iyer. The legal Liability to pay a tax on property is imposed on the owner by section 86 of the District Municipalities Act, 1920 and the tax has to be paid within 30 days after the commencement of the half year. The procedure for assessment is set out in part 1 of schedule IV of the Act and by virtue of section 124, the rules in the schedule have the force of law.

The responsibility for determining the value of the property for purposes of taxation has been laid on the executive authority of the municipality under rule 6. Rule 7 casts on the authority an obligation to maintain assessment books showing, inter alia, the value of the property and the tax payable. These books have to be revised by it completely once in every five years (Rule 8(1) but rule (2) empowers it to amend the books at any time between one revision and another. Such amendment is deemed to have taken effect on the first day of the half year in which it is made. So when once such amendment is made, a legal liability is cast on the owner to pay the tax as amended. By virtue of section 86 the tax will become payable within 30 days after the commencement of the half year unless a demand notice had been previously issued for the half year on the basis of the old rate. In the latter case, the amendment will take effect from the succeeding half year. Such assenssment becomes final and is the tax legally payable by the owner unless revised as provided in rule 10. There is therefore no warrant for taking the view that the executive authority can very the assessment at any time or from time to time as it pleases.

Rule 10 enables the owner to apply for revision of the assesment with 30 days of service of notice

on him (60 days in certain specified classes of cases) of such amendment. If he does so apply, the executive authority becomes entitled under the rules to revise the assessment if there are sufficient grounds and the orders passed by it and communicated to the petitioner under rule 13 fix formally the legal liability of the assessee subject only to the right of appeal to the Municipal Council under rule 23. If he does not apply as provided in rule 10, even the executive authority would have no jurisdiction to very the order previously passed by it determining the assessment. The only right left to the owner is an application under rule II for variation of the assessment in the succeeding or subsequent half years on the grounds set out therein. Rule 1. ..lso provides a period of limitation for such applications.

The scheme of the taxation rules is to provide periods of limitation for each step to be taken by an assessee and there is nothing either in rule 10 or, 11 to suggest that the executive authority has any power to excuse the delay in taking the requisite steps. The municipal council however has been authorised to hear appeals presented to it after time, provided sufficient cause is shown. (See proviso to rule 20). The municipal council is empowered suo motu or otherwise to cancel or modfy at any time any order passed by the executive authority reducing or remitting a tax, though it cannot interfere with any order enhancing the assessment exceppt on an appeal duly preferred under the rules. Appeals can be preferred only against orders passed under rule 13, on revision petitions duly filed under rules 9,10,and 11. Rule 10 specifically states that an application for revision can be considered if presented within time. If not so preferred within the time, the application cannot be considered at all and has to be rejected. The amended assessment under rule 8(2) will then hold

good and the assessee will not get the benefit of the extended time for payment of the tax provided for in rule 13 read with rule 15.

I am therefore of opinion that an order passed by the executive authority of a municipal council rejecting an application for revising property tax assessement on the ground that the petition was time barred under rule 10 is not an order passed by him under rule 13 and no appeal will lie against that order under rule 23. If, however, the executive authority erroneously holds that the petition is time barred (while it is within time), an appeal will lie and the municipal council can take the correct view that there is no bar of limitation and pass such order thereon as it thinks fit, including a remand to the executive authority for disposal on the merits. The provisions of the Indian Limitation Act, 1909, cannot be applied by way of analogy to cases of revision petitions under taxation rules as section 5 of the Limitation Act itself enacts that it will apply only to cases to which it has been made specifically applicable. As regards appeals the principle of section 5 has been adopted in the proviso to rule 26.

Having regard to rules 11 and 26, the period of 30 days mentioned in rule 10 must be treated as a period of limitation. Otherwise an assessee, who does not prefer any revision petition within time allowed by law, would derive greater advantage than one who complies with the rule. He would get the benefit of the extended time on payment under rule 13 and be able to prefer an appeal to the municipal council at any time he chooses.

When considering an appeal under rule 23, the council can decide that the revision petition was rightly dismissed by the executive authority as time barred. If it takes the view that the revision petition was in time, it can dispose

dispose of the appeal either on the merits or remit the application to the executive authority, for it is entitled to have the views of that authority before itself disposing of the appeal on the merits of the assessment. But it cannot consider the question whether there was sufficient cause for not presenting the revision/ petition in time.

Tax - Property - Municipal Councils - Appeals - Powers of Municipal Councils.

Ref: Memorandum No. 46327/48/3A dated 21-2-1949, Local Administration Department.

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11/21-3-49. Sri K.Rajah Iyer, The demise dated 5-3-47 does not, in my opinion, satisfy the definition of kanam in section 3(L) of the Malabar Tenancy Act, 1929 as there is no provision for payment of interest by the lessor to the lessee on the Janam amount though, perhaps, if may nevertheless be a Kanam a generally understtod in Malabar. 'Kanam' has been held by the ~~Lessor~~ Madras High Court to be a transaction combining the legal incidents of both a mortgage and a lease. In other words, it has been described as an 'anamolous' mortgage. In the document now in question, we have the usual terms of a lease and further the amount originally lent has been made a charge on the property demised. So it is an anomolous mortgage and the absence of a stipulation to pay interest will not affect the nature of the security. Therefore the demise may be treated as a 'Kanam' as generally understood in Malabar though it is not a 'Kanam' as defined in the Malabar Tenancy Act.

This, however, cannot affect, materially the position of the Government as I presume it is not its intention to claim in respect of this tenancy the right conferred on a tenant under the Act, Such rights and obligations are quite different from those now claimed by the Forest Department which, in substance, is a permanent tenancy on the strength of the Government for perpetual renewal found in the document. Under the Act the right conferred on a tenant is one of renewal for 12 years only at a time and the fee' payable on each renewal will have to be ascertained in accordance with the provisions of section 17 of the Act except in case the lease can be said to fall under sub-clause (ii). Foreover the desire now is of forest land for growing and felling timber and for

planting tea, coffee etc. Such leases are excepted under section 2 of the Act and so the Act is not at all applicable to the transaction.

The real question, therefore, is whether the Covernant for perpectual renewal found in pragraph 7(c) of the lease deed is valid and enforceable against the temple. In a serice of decisions commencing with 14 Bengal Law Reports, page 450, it has been held that, a permanent alienation by a manage or trustee of a temple or religious endowment will be invalid in the absence of imperative necessity or benefit to the trust. 14 B.L.R. 469: 2 Cal. 341 (P.C.) at pages 351 and 352; 27 Madras 291 at page 295; 36 cal. page 1003; 40 Madras 709; 46 Bomb. 481 57 M.L.J.219 (227). A covenant for perpetual renewal is not in this respect distinguishable from a permanent lease. See A.I.R. 1933 Madras 852 38 L.W. 843. No doubt the granting of a Kanam is an ordinary act of managment and a Karnavan or Uralan in Malabar will, prim facie, be competent to enter into such an transaction and the burden will be on the junior members of the tarwad to prove that it is an improvident act if they seek to challenge it; 56 Madras 92 (F.B.) Per Ananthakrisha Iyer J. at p. 102; and a bare covenant for renewal will also be valid and enforceable in the absence of evidence that it is not in the interest of the family or the trust concerned. IL.R. 1945 Madras 735: 71 M.L.J. 727. But it has been expressly held that a covenant for successive renewals will be valid only if supported by legal necessity. 10 L.W. 427 52 X.C.675; 38 L .W. 843 - 1933 (A.I.R.) Madras 852, though the validity of such a covenant may not be open to attack on the ground that it is a clog on the equity of redemption; 7 L.W. 110; 1935 M.W.N. 1003 - 1937 (A.I.R.) Madras 126; 2 L.W. 941 - 1915 M.W.N. 793 - Had the transaction here been an ancient one, there would have been scope for raising a presumption of legal necessity. 38 L.W. 843 and 43 Bom. 481. But the demise now in question is only of the year 1917 and there is

no recital even as to legal necessity in the document. On the other hand the trustee has in this case contracted to renew the lease on the same terms inclusive presumably of the rate of rent. Compared to the terms of the Kanam deed of 1840, the lease nowsbought to be renewed would appear to be even less beneficial to the temple. In such circumstances the contract will be held to be an improvident one not binding on the institution. 13 M.I.A. 270(275); 27 Madras 291 at p. 295;36 Cal. 1003 at p. 1013; 51 C.L.J. 25 - 1930 (A.Y.R.) Cal. 270.

The Government cannot also claim to have acquired a title to a permanent tenancy by adverse possession on the strength of 59 Madras 809 as the document given only an option to the Government to renew the lease and it has been in possession all along only as a tenant for a definite limited term.

The validity of the Covenant in question has further to be determined as one for perpetual renewal and it cannot be split up or construed as one including a valid subsidiary covenant for renewal for another term of 30 years. (23 M.L.J. 260 at 266). The document as itstands obliges the trust to accept a loan of Rs. 12,000/- subject to its repayment in instalments with interest. This, in my opinion, is onerous and cannot be held to be beneficial to the institution.

I am of opinion, however, that if there is a valid contract to renew the lease, it can be enforced against the temple notwithstanding the enactment subsequently of section 76 of the Hindu Religous Endowments Act. It has been decided in 1941 (2) M.L.J. 424 that that section does not effect the statutory right to renewal conferred by section 17 of the Malabar Tenancy Act. On the same principle the section cannot also invalidate a vested contractual right to renewal which has be specifically enforced. It may

It may be the trustee would be bound to obtain the sanction of the Board before executing the lease deed but the Board cannot withhold its sanction in such circumstances. If it does, the contract can be specifically enforced in a court of law against the institution and it cannot be said to have become impossible of performence. Section 80 has no bearing on this contract as what is sought to be enforced is a contractual right and Government does not purport to act in its executive or soverign capacity.

The period of limitation for filing a suit for specific performance is three years from 5-6-1947 when the contract was repudiated by the executive officer of the temple, there being no fixed date for the performance of the contract, under Article 113 of the Limitation Act. But as the Government is the party enforcing it, the extended period provided in Article 149 of the Limitation Act will apply;

Having regard, however, to the legal difficulties I have pointed out as regards the validity of the contract, I recommend a settlement of the matter outside court as suggested by the Board of Revenue and the Hindu Religious Endowments Board.

Sub: Forests - Lessee - Nilambur Division - Trikkalayur Devaswam Forests - Renewal of- Legal Opinion.

Ref: Memorandum No. 98385 C11/47-18 dated 1-12-1948, Development Department.

Sub: Suits - (Guntur) - Sub Court - O.S. 100 of 1947 Sattenapalli Taluk - Nandigama Village - Village Munsiff - Reinstatement - Objections - Provinces of Madras impleaded as second defendant - Adverse decision - Appeal.

Ref: Memorandum No. 65082 CK/48-4 dated 4th April, 1949, Revenue Department.

12/8-4-1949. Sri K. Rajah Iyer: I cannot advise the filing of an appeal by the Government in this case. It is quite likely that the unsuccessful party will file his own appeal, in which the Government will necessarily be impleaded, and then the Government can have its own say.

I am by no means sure that the view taken by the Subordinate Judge is incorrect and therefore this is not a case in which I can advise the Government to file a substantive appeal for the purpose of obtaining a ruling on the question. It must be remembered that the office in question is a hereditary one wherein private rights are also involved. And the matter is one which is defined and regulated by Statute. Under such circumstances, I am strongly of the prima facie view that no Crown prerogative of clemency can be invoked. The point can be further studied and investigated and, if sound, raised at the hearing of the appeal by the private party.

No. 13.

O P I N I O N.

Sub: Motor Vehicles - The Motor Vehicles (Madras Amendment) Act, 1948 - New Section 64-A Exercise of revisional powers by the Government with retrospective effect:

Ref: Memo. No. 21632-0/1949-2 d/6-4-49, Home Deptt.

The view taken by the Government that section 64-A of the Motor Vehicles (Madras Amendment) Act cannot have any retrospective operation is correct. I am of opinion that the power of revision conferred by it cannot be exercised in respect of any order or proceeding which became final before 21-12-1948 although the order or proceeding might have been received by the party concerned after that date. (Vide 9 Lahore 284 (P.C.) at p. 290).

Madras, 11,4,1949. K. Rajah Ayyar, Adv. General.

/True Copy/

H.M. Small.
GOVT.SOLICITOR.

No.14/11-4-49.

Sri K. Rajah Iyer. Section 57 of the Madras Co-operative Societies Act, 1932, empowers the Government to call for proceedings of offers subordinate to it and pass such orders thereon as to it may seem fit. It does not empower the Government to review its own orders. With reference o an almost similar provision in the Madras House Rent Control Order, 1945, I pointed out in my opinion No. 25 dated 26th May 1947, to the Development Department 'that it it settled law that a power of review must be expressly conferred by Statute. Vide 33 Madras 65 and 37 M.L.J. 162. Once the power to revise conferred by a Sta ute has been exercised, whether on appeal or in revision, it becomes exhausted and there can be no further right to review that order. The Fact that there are no words in section 57 that 'the order is final' does not mak any difference in law. A power conferred by Statute to revise an order passed by a subordinate authority cannot be construed as authorising a reivew of its own order passed on appeal or in revision.

I do not however wish to be understood as saying that in no case can the Government very or alter its previous orders. It is quite possible to conceive of various orders which are purely administrative in character not affecting legal rights created or dealt with by the Act. In such cases, I am inclined to think that there will be no bar to th the Government exercising powers of the nature under considera tion. The scope of section57 should be confined to the exercise of judicial or quasi-judicial powers and functions.

Sub: Acts and Rules - Co-operative Societies Act -Sec. 57 - Entertainment of Second Apppal.

Ref: Memo.No. 25711 BII/49-2 dated 5th April 1949, Development Department.

CONFIDENTIAL:

No. 15. **O P I N I O N.**

Sub: Irrigation - (Tungabadra Project) - Levy of betterment fee - Legislation.

Ref: Memorandum No. 3835 FH/45-19 dated 28-1-49, Revenue Department.

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The levy of betterment fee is really in the nature of a tax on the capital value of the land since the idea is to tax the unearned increment in the market value of the land on account of the facilities and advantages offered by the project. At first sight I was inclined to doubt whether the provincial Legislature ~~xxx~~ had power to levy a tax on the capital value of lands as such, but on further consideration, I am inclined to the view that Provincial Legislature has such a power. Entry 55 of the Federal Legislative List relates to the subject "tax" on the capital value of the assets of individuals and companies" but it excludes from its scope agricultural land. In the Provincial Legislative List or the concurrent Legislative List, there is no specific reference to the tax on the capital value of agricultural land, though it is excluded from Entry 55 as already mentioned. But the whole field of agricultural and rights in agricultural land are given to province as legislative subjects. Entry 20 in the Provincial List relates to Agriculture, Entry 21 relates to land generally and transfer, alienation and devolution of agricultural land in particular. Dealing with expression "land" in item 21, the Privy Council has held that it is used in a most generic and comprehensive senses and includes every kind of alnd and all rights of whatever description in land. In regard to taxes, however, the only entries in the Provincial List are, Entry Nos. 41,42,43 and 43(A). Entry No. 41 deals with taxes on agricultural income, Entry No. 43 deals with duties inr espect of succession to agricultural land and Entry 43(A) deals with Estate Duty in respect of

agricultural land; conspicuously however, there is no reference to tax on agricultural land or the capital value of agricultural land. Entry No. 42 refers to taxes on "Land and buildings" go together and constitute a single item and therefore connote lands in urban area and the taxes referred to are in the nature of property tax of lnd and building situate in towns or other residential localities and in that context, lands cannot include agricultural land as such or the capital value thereof. But such a contention would lead to the result that the Province has no power of taxation on agricultural land at all as contradistinct from a tax on agricultural income. It will be repugnant to assume that the Parliament withheld such a fundamental power from the provincial Legislature. Especially when Entry No. 55 of the Federal List Excludes agricultural land in relation to tax on the capital value, the necessary implication in that the power of imposing tax on the capital value in regard to the agriculture and agricultural lands. I am therefore of opinion that the Province has power to levy a tax on the capital value of agricultural land.

I am, however, no prpared to say that the Provincial Legislature has power to levy the tax in the shape of a portion of the land itself. The word 'tax' in all the Entries in the various lists is used in its ordinary and grammatical meaning, viz. imposition of a sum of money payable to the State. It is of course open to the Government to give a wider meaning to the word 'tax', if the Legislative practice existing prior to the Government of India Act was that taxes were collected in kind or in cash but as far as I am able to examine the various enactments there does not appear to be any practice to levy a tax in the shape of land itself. Further, the reasons which induce me not to adopt that construction are that even though the provincial Government may have the power to impose the tax, it is quite open to the subject to pay the tax in cash and he cannot be forced to part with his property. He may like to keep the land itself and pay the state, its contribution of the increased value of the land but he cannot be compelled to give up the land.

The value of the particular land that he is asked to give up is entirely a matter of his discretion. He may put his own value and he cannot be compelled to value a protion of the land at the figure equivalent to the sum payable by him as tax,. Hence the power to collect the tax does not imply the power to compel the owner of the land to give up a portion of the land valuin it in a particular manner. Of course, it is quite open to the Government to give an option or choice to the owner of the land to pay the tax in cash or to give up a portion of the land at stated value, the value itself being based upon the same date on which the tax is levied and calculated. But this by itself may not lead to the complete achievement of the proposed object. E en if an option is given to the owner every block of land and he should exercise the option in favour of giving up a portion of land, it will only mean that the will get isolated pieces in differennt blocks of land and such isolated pieces cannot be conveniently utilised for the purpose of colonisation. Legislation, which extinguishes the rights in a portion of the land treating, the same as payment of t ax, is of an expropriatory character failing within the scope of section 299 of the Government ofIndia Act and as such is open to attach if it does not provide for payment of compensation.

2. The solution, to my mind, seems to be that two enactments may be passed, one enactment imposing the tax and giving the option to the owner of the land to pay the tax in the shape of land itself; Another enactment which gives power of acquiring blocks of continguous lands for the purpose of colunisation and laying down the principles of compenstion similar to the principles withreference to which the tax is imposed. As I stated in connection with the Xamindari B.II, the compensation that is eontemplated in section 299 of the Government of India

Act need not be the market value of land but any reasonable compensation calculated on principles laid down by the Legislature. If, therefore, the principle that is adopted for the purpose of levying a betterment fee is also adopted as the principle to determine the compenstaion, then such legislation, in my opinion, fulfils the requirements of section 299. This obviates to a large extent the necessity of the Government being obliged to find the money for acquisition. It is not necessary that the method of compenstion under the Land Acquisition Act alone should be followed. This of course, may not get over administrative difficulties or delay.

MADRAS-
11-4-49.

S d.....
Advocate-General.

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CONFIDENTIAL.

No. 16.

O P I N I O N.

Sub: Copyright - Government document - Infringement

Ref: Memorandum No. 92002/03/48-4 Edn., dated 22-2-1949 Education and Public Health Department.

I am of opinion that the Government had a copy right in the note prepared by it (vide section 18 of the Indian Copyright Act). But the Government had placed the note in the hands of Mr. Hanumantha Rao for purposes of giving publicity through the press and the article had been published in local dailies. The details contained therein have been made public and in pursuance of the object of the Government that the p ublic should be acquainted with it.

No doubt Mr. Hanumantha Rao had included the note bodily in the article which was published in 'Commerce', but considering the purpose of the publication and the directions of the Go ernment in that behalf, it is too much to say that the Government still intended to reserve their rights to the copy-right in the note. In any event the court may not consider that Hanumantha Rao intended to infringe the copyright but that he thought that by sending the article for publication as he did, he was only fulfilling the very object and purpose of the Government in preparing the note viz., wide publicity to the general public.

As stated by the Editor, 'Commerce", the payment made to M r. Hanumantha Rao was done in the usual course of business without any prior stipulation therefor. Though Mr. Hanumantha Rao might have e xpected to be paid for the article, he did not stipulate in advance for any such remuneration. It cannot be said that the infringement was made for purposes of 'sale' within the meaning of section 7(a) or (b) of the Indian Copyright Act.

I am, therfore, of opinion that in the circumstances, there has been an abandonment of the copyright by the Government and the action of Mr. Hanumantha Rao in the circumstances would not amount to an infringement of the copyright for purposes of sale. A prosecution, if launched, therefore may not be successful.

MADRAS.
11-4-49.

Sd. K. Rajah Iyer,
ADVOCATE-GENERAL.

No. 17 dated 11-4-49.

O P I N I O N.

Sub: Tax - The Madras General Sales Tax Act, 1939 Sales by the Departments of the Government of India - Liablity to tax.

Ref: Memorandum No. 30557-M/48-10 dated 16th March, 1949, Revenue Department.

The point now referred to me for my opinion is different from the point I was dealing with in my previous opinion. The question that I was then considering was whether there is any general immunity of the Crown fromtaxation and in that sense the Crown is not bound by the Madras Sales Tax Act. The point now referred, however, is whether on a construction of the provisons of the Act, the Crown can be assessed as a dealer in respect of the business carried on by it in the Province.

In 25 Madras 457, Mr. Justice Easham Iyengar formulates his conculusions at page 500 and two propositions are relevant in this context. (1). "The connon of interpretation of statutes that the prerogative or the rights of the Crown cannot be taken away except by express words or necessary implication is as applicable to the statutes passed by the Indian Legislature as to Parliamentary and colonail statutes; (2) According to the uniform course of Indian Legislation, statutes imposing duties and taxes bind Government as much as its subjects unless the very nature of the duty or tax is such as to be inapplicable to Government". The view that, in the case of taxing statutes it is the exclusion that must be specified seems to have been accepted in A.I.R. 1935 Bom. 347 at 349. Per amount C.J.,

> "In the case of the sections relating to taxation it is not disputed that the Crown is bound except where exempted from payment".

The other Judge reats it on the ground that the Crown is bound by necessary implication of the sections. In A.I.R.

In A.I.R. 1934 Bom, 379, the view of Bashyam Iyengar J was dissented from as being inconsistant with his own major premise. In 1947 (1) M.L.J.45 the privy Council may in unequivocal language that the law in this respect is the same in England and in India and is to the effect that the Crown is not bound unless the intention to bind the Crown is expressed or necessarily implied in the provisions of the Statute in question. The Provisons which were the subject matter of consideration in that case were not taxing proisions,. They related to a laying of a drain or a main in private property. It may thus be distinguished on the facts and it may be argued that their Lord ships were not dealing with the rule of construction applicable to taxing statues but I must point out that the decision in 1902(2) K.B. 73 referred to by their lordships as laying down the correct principle is itself a case of construction of taxing provisions. It may be difficult to sustain the correctness of Bashyam Iyengar J's view after the pronouncement of the Privy Council. If the test laid down by the Privy Council were to be applied, it is difficult to say that the provisions of the sales Tax Act necessarily imply an intention to bind the Crown.

But there is another aspect of the matter which may lead to a different result. The rule ~~xg~~ of construction laid down by the Privy Council may not apply to statues enacted by the legislative authorities under a Federal Constitution. In an ultimate sense, the Government of the Units, namely, the provinces, and of the Federation, that is the centre of Dominion, is carried on in the name of the Crown and as such it may well be said, the Crown in the shape of the Province, is taxing the Crown in the shape of the centre. Though in this sense the Crown is only one juristic porsonality, in a very real sense the Government of a province is different from the Government of every other province and of the Centre. And, therefore, it may well be argued that the-3-

the Government that is sought to be taxed stands on no higher footing than, or in any different position from, any private individual or the ruler of an Indian State except to the extent that any exemption is created by the Constitution Act. If that is so, the rule applicable to a private body trying to bind the Crown need not necessarily be extended to one Government seeking to tax another Government. The only test may well be, whether the Government proposed to be taxed has or has not carried on operations which attract the liability to taxation.

As far as I have investigated, I have not been able to discover any case dealing with his aspect of the question arising in a federal constitution and I do not wish, therefore to be categorical about it. In as much as, however, there can be no doubt about the competency of the the Provincial Legislature to impose the taxation it is quite open to the Government to clarify the position by an amending Act.

SECRET.
No. 18/19-4-49.

My opinion on the points referred to me is as follows:

Question No. 1. Under section 4(1), Ceylon Citizenship Act, 18 of 1948 Anthoni Pillai is a citizen by deacent because he and his father were born in Ceylon. He ceases to be a citizen of Ceylon under section 19 of the Act, if he becomes the citizen of any other country voluntarily or by operation of law. So unless he has already become a citizen of India, he does not cease to be a citizen of Ceylon.

Question No. 2(a). Under the Government of India Act, 1935, no person shallbe a voter unless he satisfies the requirements mentioned in perngraphs 3 and 5 of Part I of the VI Schedule. Anthoni Pillai falfils the requirements of paragraph 5. Obviously he does not fall within clauses (b) and (c) of paragraph 3; so, the only question is whether he was a British subject under clause(a). The word 'British subject' is not defined in the Act or in the schedule and we have to turn to the British Nationality and Status of Aliens Act 4 and 5 Geo.5,Ch.17 of 1914. Section 1(1)(a) treats any person born within His Majesty's dominions as a natural born British subject. "His Majesty's dominions" comprise the territories included in the British Empire- vide Malabury (Hailsham Edition) Vol. XI,page 1, paragraph 1. 'Dominions' ~~comprise the territories included in the British Empire- vide Malabury-4~~ is used as distinct from the 'Dominions' in the first schedule. Ceylon through it is not a Dominion in the first schedule is one of His Majesty's dominions. From this point of view, Anthoni Pillai would be a British subject though I have some little doubt whether in the contaxt the framers of the schedule to the Government of India Act, 1935 , intended to teeat all persons born in the British dominions alike for purpose of electoral qualifications. However, as the Government of India Act is a statute of the Parliament,

the meaning given to that expression in English legal parlance may have to prevail.

Question No. 2(b) Under clause 5(1)(b) of the Draft Constitution, a person having his domicile in the territory of India at the date of the commencement of the constitution shall be a citizen of India. By reason of the explanation, he acquires the domicle by depositing the declaration as required therein and there is no power vested in the authorities to refuse to accept the declaration and if there were no other prohibition or impediment, the declaration, coupled with residence for a month prior to it, entitles the person to citizenship on the ground of domicile. But, it seems to me that the proviso to clause 5(1) may preclude Anthoni Pillai from claiming citizenship. The proviso reads:-

> "Provided that he has not voluntarily acquired the citizenship of any foreign State

The word 'acquired' may mean one of two things. It may be construed in a wide and comprehensive sense and be taken to include cases where a pe son acquires citizenship by birth by operation of the laws prevalent in the country or, it may be construed strictly and grammatically and confined only to cases where a person has by his own act, independently of birth or nativety, acquired the citizenship,. Of course, the latter construction is the prima facie meaning. But it may well be argued that, having regard to the context and in the light of the explanation, the purpose underlying the proviso to preclud a citizen of a foreign State from being a citizen of India. Of course, my view is that the words in the proviso have to be understood in a broad and comprehensive sense for the very reason that under explanation in clause 5, any person is entitled to acquire citizenship by domicile merely by residence for 30 days followed by declaration. It would be repugnant to assume that the framers of the constitution intended tor ender themselves powerless to deny domicile under the explanation and

and also to exclude all cases of natural citizenship in any foreign state from the operation of the proviso. But one can nover be too sure in courts of law. Hence if the wider construction is accepted, Anthoni Pillai will not be a citizen of India, because Ceylon is a foreign State unless and until the President declares it to be not a foreign State. Ig the narrower construction is adopted, he will be a citizen under the New Constitution.

Question No13 It has been sated that Anthoni Pillai was included in the electoral roll for the Assembly under the literacy qualification. Under Section 48, City Municipal Act, however, there is a prohibition against inclusion unless the person is a British subject or subject of a state in India. Anthoni Pillai is not the subject of a State in India. I have already discussed the question whether he is a British subject because there is no definition of 'British subject' under this Act. That answer applies here.

Question No. 4. If he was not a British subject on the date of inclusion in the roll, then his inclusion must be legally invalid. But rule 7 of the Electorl Rules, 1936, Precludes any objection being raised to hax the inclusion except in accordance with the rules and the validity of an inclusion cannot be questioned in a Court of law. But I very much doubt whether any rules framed by the Provincial Government can defeat the mandatory provisions of a Statute unless the rules themselves have the force of Statute. That depends upon under what section the rules are made and whether that section invests the rules also with statutory force.

Sub: Citizenship of India - Sri S.C .C _ Anthoni Pilla

Ref: Memorandum No. S./1003-1/49, dated 19-2-49, Public (Ele.) Department.

No.19/2-5-1949.

Sri K. Rajah Iyer. I do not think that any amendment of the Madras Prohibition Act is necessary in order to permit export of liquor freezed in the hands of licensees on the extension of Prohiniton to the remaining non-prohibition districts of this Province. Such power may be taken by rules framed under section 54(2)(a) of the Act. This section is sufficiently wide in its terms and it enables the Provincial Government to make rules for the purposes of carrying into effect the provisions of the Act, and in particular, for the issue of licenses and permits and the enforcement of the conditions thereof. Rules framed for the disposal of freezed stock of liquor on the introduction of prohinition in any particular area will not be, in my opinion, inconsistent with the provisions of section 18 of the Act. Similarly, if power is taken for disposal of confiscated articles by export, that too would not be inconsistent with section 18, as the ruleswould aid the carrying into effect the provisions of the Act. I see that under section 54(2)(i), a fule has been framed for sale of confiscated articles. But no provision appears to have been made for export by the purchasers of such articles, if these happen to be intexicating drugs or liquor. The purchaser might not be able otherwise to realise his money. If this is due to any omission, it may be rectified.

K. Rajah Iyer,
ADVOCATE-GENERAL.

Prohibition/Liquor-Export of.

Ref: Memorandum No. 18586-D/49-2 dated 2nd April 1949, Revenue Department.

LEGAL DEPARTMENT.

O_P_I_N_I_O_N.

20/6-5-49.

Sub: Bills - The workers' Provident Fund Bill - Opinion.

Ref: Memorandum No. 36105 PIII/1949-3 dated 19th April 1949 Development Department.

The Bill purports to provide for the establishment and grant of provident fund only to certain classes of workers i.e., those coming under the definition of that term in clause (j) of section 2 of the Factories Act, 1934. That definition excludes even employees in clerical service. I am doubtful whether the Bill in question so limited in scope will serve any useful purpose. Subscription to the Provident Fund is not compulsory even in the case of Government servants. Many institutions which have established Provident Funds for its employees have made it a condition of the contract of service that employees should subscribe to the Provident Fund and the employees in their turn contribute their quota to the fund. This liberty of entering into contractual relation ship may be left undisturbed even in the case of the 'workers' until a more comprehensive legislation is undertaken as a measure of social security.

Turning to the specific provisions of the Bill, I find the definition of 'employer' is wide while 'worker' refers to a limited class of employees. The two should be correllated. Secondly, the obligation to open a provident Fund has been cast on the worker also under section 3. A new expression 'Labourer' has been introduced there and it has not been defined anywhere. While every suplayer has been directed under section 3 to open a Provident Fund, subscription thereto and contribution by the employar have been made compulsory only in the case of workers - section 6 is also defective. I do not know if it is intended that at the end of 10 years, the accumulated

fund shall be paid over to the worker even though he continues in service. It is not made clear whether he should continue his subscription thereafter or not. Section 9 may be re-drafted so as to make the provision as comprehensive as section 3 of the Provident Funds Act. Provisions similar to those found in section 4 and 5 of the Provident Funds Act can also be introduced in the bill, with advantage.

M A D R A S.
6th May 1949.

K. Rajah Iyer,
ADVOCATE GENERAL.

/True Copy/

Sd. E.M.Small,
Govt. Solicitor.

No. 21.

LEGAL DEPARTMENT.

Opinion

Sub: Bills - The Prevention of Free or forced or compalsory Labon Bill- Opinion.

Ref: Memorandum No. 36106 PIII/49-3 dated 19-4-1949-Development Department.

%%%%

In think that the provision in the bill penalising 'free labor' is too drastic. The definition of that term itself is rather vague. It may not be so easy to ascertain pravailing market rates. Nor is there any reason for insisting on remmerating being in 'cash'. The laborer nowadays is in a far better postion to distate terms and the bargaining power is with him and not with the employar. Morrover I do not see why voluntary free labor should also be prohibited and penalised. Whenever a laborer does work for another voluntarily, there is often some motive for it. It may be either gratitude for favors rendered in the past or reward expected in future. I would, therefore, suggest that all reference to free labour be delated from the proposed Bill.

As regards 'forced or compulsory labor', section 574 Indian Penal Code, itself prohibite it. No further penal provision is necessary. Compulsory labor is exacted only in eertain emergencies such as floods etc., either under statuts or by custom. Regular hours of work cannot be adhered to in such emergencies. Where custom enforces it, it is only in the interests of the village community including the labouers. Annual repairs to village tanks or irrigation channels are instances of this kind. Custom itself regulates the compensation payable in such cases. Where a Statute, such as Madras Compulsory Labor Act, 1858, exacts such labor, the remuneration payable is also provided for in the statute.

It seems to me, therefore, that there is no necessity for the enactment of a special Statute to

provide punishment for free or forced or compulsory labor.

M A D R A S.
6th May 1949

K. Rajah Iyer,
ADVOCATE GENERAL.

/True Copy/

H.M. Small,
Govt. Solicitor.

//True Copy//

No. 22.

O P I N I O N.

Sub: Hindu Religious Endowments Act-Section 78-Scope of-maintainability of-

Ref; Memorandum No. 3470 F.D. 'V'/1948-3 dated 16th March 1949-Firka Developments Department.

It seems to me that it cannot be stated with any degree to certainly that the difficulty raised by the judgment of the High Court in the batch of civil revision petitions (C.R.P. No. 1341 of 1946) and other cases) can be got over by adopting the suggestion of the President, Hindu Religious Endowments Board in paragraph 7 of his letter. While I agree that may of the observations of the High Court in the judgment under reference can be taken exception to, it cannot be said that the view taken by it that under section 78, the court has a discretion to refuse delivery of possession as against archakas in service and in possession claiming in good faith to be in possession on their own account, is wholly unsupportable. It is true that after the amendment of S. 78 in 1948, substituting the word "shall" for "may", the court is bound to order delivery of possession as against dismissed trustees, office holders etc but the insertion of the words "or is otherwise not entitled to be in possession after "suspended from office" has to some extent whittled down the mandatory character of the provisions and given scope to the argument that in cases of Archakas in service claiming a title to be in possession the court has a discretion to refuse to order possession. The object and purpose of the amendment has thus been defeated. It will be an uphill task to persuad another Bench of the High Court that that the Bench decision under reference is wrong. Even previously, the view taken in the High Court was that where complicated questions of title were involved the court will not pass orders under S.78 dispossessing persons claiming title in good faith. In para 10 of the

Bench Judgment the grounds to support its view that the claims of the Archakss were bona fide are set forth. Only in such cases will archakas be able to successfully resist applications under S.78, Therefore, though I am still of the opinion that S.78 as amended is mendatory in character and the court, on production of a certificate from the Board that the property belongs to the temple or trust, is bound to order delivery of possession as against ex-trustees and temple servants, it is advisable to set at rest the doubt raised by the Bench decision by introducing another proviso in S.78 that the certificate of the Board issued under the section shall be conclusive evidence for the purposes of the proceedings under the section that the properties referred to in the certificate belong to the trust and that the respdts to such proceedings should establish their claim only in a separate suit. The suggestion of the President of the Board that we should get the Bench decision upset by a Fullor Bench is beset with several difficulties and the chances of success cannot also be assured. Further, legislation has anyhow to be undertaken to validate dertificatos already issued (i.e.prior to 13-7-1948) and this opportunity may be availed of to make the scope of the certificate of the Board precise and clear and thus resolve the difficulty now felt in getting possession of temple properties from recalcitrant Archakas.

M a d a r a s.
6 - 5 - 1949.

K. Rajah Iyer, Adv. General.

/True Copy/

H.M. Small,
GOVERNMENT SOLICITOR.

No. 23/15/6/49.
CONFIDENTIAL.

Sri K. Kutti Krishna Menon. (A.G.) If the speaker intended by his speech to excite rebellion or disturtance, his act would undoubtedly fall within section 124-A of the Indian penal code, but even if he neither excited nor intended to excite any rebellion or outbreak, still tried to excite a feeling of enmity to the Government, it is sufficient to make him guilty under the section.

I have scruitinised his speech. In my view, it contains passages which are aimed at exciting rebellion or disturbance; or, at any rate, there are passages in his speach, which excite feeling of enmity to the Government and hold the Government up to hatred or contempt (vide passages marked A,B,C,D, and E). I am, therefore, clear that a prosecution under section 124-A will be successful in this case.

Law and order - Salem District - Second Annual Conference of Handloom Weaver's on 21-11-1948 - Objectionable speech of Balu of Erode.

Ref: Memorandum No. 1684/49-3 dated 30th April 1948, Public (General-A) Department.

Raja Iyer, A.G. The subject matter of the reference is Fishery rights granted to ryots on pattan subject to the payment of fixed rents. Before considering the questions referred to me, it is necessary to state briefly the views of the Revenue authorities, regarding the origin and nature of the pattas, in so far as they can be gathered from the papers sent to me.

The exact date at which the fish pattas originated is not known, but it is stated that it dates back in some cases to 1854, if not 1844. In certain cases, separate fishery pattas were issued and in others, fishery rentals were entered in ryotwari pattas along with the assessment on lands. The original pattas which were granted at the initial settlement are not forthcoming, but it was thought that in many cases, fish pattas were originally given as Inams or compensation for services rendered, such as maintenance of Kudimaramat of the tanks (vide the remarks of Sir Frederick Nicholson, Director of Fisheries, in His Letter to the Government dated 17-7-1916.)

At the time of resettlement in the Tinnevelly District (1907 to 1909), the Special Settlement Officer, the Collector and the Board of Revenue entertained the view that pattas once issued should not be cancelled without the consent of the pattadars and the Board recommended that the existing pattas should be continued subject to enhasement of ~~12½~~ 12½% as in the case of land assessment. The Government, however, were of a different opinion and remarked that no reason existed for treating fisheries in the same manner as land and that the fact that the patta had been given for 30 years did not in itself confer the right to renewal. In the interests of fish connervation, the Government directed that the patta for fisheries should be cancelled and that all the fisheries should in future,

in future be leased out. In connequence of certain representations, the Government subsequently decided to continue the existing pattas for fisheries but it was considered inadvisable that any as patta should in future be issued for a longer period than 5 years. Orders were accordingly issued and it was directed that at the expiry of the period of 5 years for which the pattas were granted, they should be renewed for a similar period or cancelled at the discretion of the collector. In passing orders on the proposals for settlement in the Chingleput district the Go ernment, by their order dated 4-6-1910, directed that the fixed fish rents should be enhanced by 15 per cent and that the rent should be settled on those terms for a period of 5 years only. It was further directed that at the expiry of the period, the Collector may renew the grant for a similar period or cancel it at his discretion.

The above-mentioned directions of the Government clearly show that they did not recognize anyright in the pattadar for a renewal and that the Collector was given absolute discretion either to grant the renewal or refuse it. The inhabitants of Tinnevelly District, not being satisfied with the orders of the Madras Government, submitted amemorial to the Secretary of State, regarding their rights in the Fishery Pattas and the Secretary of State passed orders dated 19-8-1910, observing that the Madras Government in conceding a 5 years' term, has virtuallyadmitted the memorialists' claim and that it will remove doubt and suspicion in their minds, if they are informed that the settlement is for 30 years as heretofore. From this, it is evident that the Secretary of State recognized the right to a renewal of the patta for the full settlement period of 30 years.

When the period of fish pattas in Tinnevelly was at the instance of the Secretary of State extended to 30 years, the Madras Government considered that no action was necessary in the case of Chingleput, unless the ryots filed an appeal against the orders of the Government. The matter again came up for consideration by the Madras Government inthe resettlement of North Arcot and the Government ordered in

in the year 1913 that fish pattas should be continued for the term of resettlement but with a general enhancement of rent, and with the proviso that the patta rentals may be enhanced further in the case of first and second class tanks if the Fisheries Department should re-stock such tanks.

The practice of giving fishery rights on pattas has been in vogue in only seven districts of the Presidency. Extracts relating to fisheries from the resettlement notification of 4 out of the 7 districts are given in the Government Memorandum. From the extracts, it is clear that the Government have issued pattas for fisheries in the same manner as they issue pattas for land, vesting the full proprietory rights regarding fishing in the grantees of the pattas. The only reservation made in favour of the Government is the right to revise the rents on expiry of the settlement period of 30 years and the right is the case of certain classes of tanks in two districts to enhance the rents, if the fishery department should re-stock such tanks with fish during the period. In the case of land granted on ryotwari patta, it has been held that the proprietorship of the ryotwari holder is only subject to the prerogative, which the Crown has according to the common law of India, of imposing by an Executive Act assessment on land and verying it from time to time. It has been further held that assessment is incapable of increase during the period for which the settlement is made. I do not see any reason why the grant of fishery rights on patta should not have the same legal consequence as the grant of land on patta. The pattas granted for the right of fishing do not contain any reservation in favour of the Government and they should therefore be regarded as pattas of a permanent nature and not as mere leases for special purposes.

I am, therefore, of opinion that the holders of the fishery rights have the right of enjoyment of fisheries, subject to payment of stipulated fishery rent.

From what I have stated above, regarding the rights of holders of fishery pattas, it is clear that the pattas cannot be cancelled and that the right of Government is confined to increasing the rents at periodical settlements and even during the settlement period, if there is a binding agreement to increase the rent during the period, as exists in the case of some pattas in a few districts.

Without legislation, it is not possible to deprive a peron of his rights and if the fishery pattadars' rights have to be taken away, it can be done only by legislation. In the case of ryotwari pattadars of lands, compensation is paid when their rights are taken away and I do not find any reason why fishery pattadars should be treated differently The compensation may be fixed at a certain number of years' purchase of the annual rental which the fishery right would fetch, if auctioned. It may be that Section 299 of the Government of India Act (which provides that the Legislature has no power to make any law for the compulsory acquisition of land, without payment) has no application to fishery rights as such and, consequently, the Legislature has power to make laws to acquire fishery rights even without compensation but it is neither just nor equitable to take away a person's right without paying any compensation therefor. I do not think that any differentiation should be made between fishery pattas and ryotwari pattas in which fishery ryots are also included.

All persons mentioned in the patta should be deemed to have as interest in the fishery and the compensation should be equally divided among at them.

Sub: Fisheries - Inland - Fishery Pattas - Cancellation.

Ref:- Memorandum No. 34789 C/48-4 dated the 28th April 1949, Revenue Department.

No. 25/2-7-49.

Sri K. Kuttikrishna Menon A.G. 'Establishment of Standards of Weight' is a subject oppearing as item 51 of Federal Legislative List and therefore the Provincial Legislature has no power to pass any enactment with reference to it.

Section 3(1) (a) of Act XXII of 1948 enacts that 'the standrard weights' specified in the Standards of Weight Act 1939 and other weights specified in Part I of the schedule, being integral multiples or sub-multiples of one or more of the standard weights aforesaid, shall be the recognized weights for the purposes of the Act. In other words, the local legislature has laid down that the standard weights mentioned in the Standards Weight Act 1939 and their integral multiples and subliples alone shall be the recognized weights. The question referred to me is whether the Madras Weights and Measures Act can be amended so as to make the Pagoda a recognised weight. Pagoda is not an integral multiple of sub-multiple of any of the Standard Weights mentioned in the Standards of Weight Act and cannot therefore be regarded as a standard weight. The point for consideration is whether P agoda, though not a standard weight can be made a recognised weight by an amendment of the Madras Act; or to put it in an - other form, can the Provincial Legislature make the pagoda a recognised weight though any amendment of the Act which has the effect of making the pagoda a standard weight would be ultra vires the Legislature? The dictionary meaning of 'Standard' is "the authorized exemplar of a unit of measure or weight', "an established or authorized measure or weight, length, quality or the like". If pagoda is by legislative enactment made a recognized weight, it becomes an authorized or established measure

measure of weight or, in other words, a standard measure of weight. Establishment of standards of weight is a subject in the Federal Legislative List and is outside the purview of the Provincial Legislature. I am therefore of opinion that the Act cannot be amended no as to make the pagoda a recognized weight.

From the above reasoning, it is obvious that the suggestion to make pagoda a concurrent recognized weight cannot also be accepted.

If, however, it is considered desirable to allow the use of pagoda in the trade in gold and silver the penal provisions of the Act, namely Section 9, may be suitably amended so as to provide an exception for such use.

Sub: Acts - Madras Weights and Measures Act, 1948 - Inclusion of "Pagoda" in the schedule.

Ref: Memorandum No. 11331-G/49-4 dated 27-5-1949.

No. 26/4-7-49.

Sri K. Kuttikrishna Menon. (A.G.). Sub- section (4) of section 10 of the Madras Hereditary Village Offices Act, 1895, provides that where an office has become vacant by the dismissal of the holder, the Collector may direct, that, until the death of such holder, the duties of the office shall be performed by some person duly qualified under sub-section (1). Similarly, in the case of suspension of the holder, it is laid down that the Collector may direct that, until his return to duty, the duties of the office shall be performed by some person duly qualified. In either case, the person directed to perform the duties should not be an undivided member of the family of the dismissed or suspended officer. It may appear at first sight that, according to the section, the person directed to do the duties gets a vested right to remain in office till the death or return to duty of the last holder. But it has been held that the section has not that effect. The following observations of Pandalai J, would make the position clear:- (A.I.R.1931 Madras 607and 608).

> "It is argued from these extracts that a person appointed under section 10(4) has a qualified hereditary right defeasible no doubt by the return of the suspended, officer or by the death of the dismissed officer and existence of heirs on his death but not otherwise. I do not agree with this at all. A person appointed under s.10(4) is a person appointed only to do the duties of the office and when the section says that the Collector may direct that until the death or return to duty of such last holder the duties of the holder shall be performed by some person, it only prescribes the period of time during which that provision has to be made but does not mean that the person who is appointed is to hold for that period. Such a person is in no better position than any one else who is put in temporarily to do some one else's work and it will be presumed that the authority which appointed him has the authority to remove him.

> The respondent therefore had no right to the office as such and was liable to be sent away when these who appointed him though that a better substitute could be found.2.

If a persons who was an undivided member of the family of the last office-holder at the time when the office became vacant, gets himself divided subsequently, there is, in my view, nothing in the section which could prevent the collector from appointing the vidived member to the Office. It is true that sub-section (4) of section 10 of the Act permits the appointment of only a person who is not an undivided member of the family of the dismissed or suspended officer. But the status of division or non-division has to be fryminister be determined with reference to the time of the appointment and not with reference to the time when the vacancy arises. I am, therefore, of the opinion that there is no legal impediment for the appointment of a person who has become a divided member of the family subsequent to the date of the dismissal or suspension of the last office-holder and there is no necessity to have the Act specifically amended to proviso for such appointment.

Village Officers - Status of a village officer appointed in a vacancy course by dismissal, removal or suspension with a bar order.

Ref: Memorandum No. 21703-CEM/48-5 dated 16-5-49, Revenue Department.

27/6-7-49.

Sri K. Kuttikrishna Menon (A.G.) The first question referred to me is whether or not it is the legitimate function of the Government to undertake and bear the cost of construction of the protective works necessitated by erosion from the sea.

We have the high authority of Loard Coke for the following statement:

> "The King ought of right to save and defend his realm as well against the sea as aginst the enemies that it should not be drowned or waster"

In the words of Brett, L.J.

> "there is a duty on the King, by reason of his being King, to defend his realm, and therefore of course all his realm and every part of his realm against the sea, so that no part of the realm could be drowned or wasted by the sea"

(vide Attorney Journal V. Tomline 1880 Vol. XIV - Chancery Divison, page 58). All the Law Lords who desided Attorney-General V. Temline, following the above observations of Lord Coke, have stated unequivocally that it is the duty of the Crown to protest the realm from the inroads of the sea by maintaining natural barriers or by raising artifical barriers. This principle has been accepted as good law by the Indian Courts (see the observations in Secretary of State V. D attatraya, 26 Bombay, pages 271 and 280 - see also 1938 (1) M.L.J.17). It is true that, as pointed out in the cases above-mentioned. it is a duty of imporfect obligation, i.e., a duty that the subjects have no means of enforcing against the King in a Court of Law. Neverthless, it is a duty and, as has been rightly pointed out in the Bombay case, the agent of the King, left in the administration of a village on the King's behalf, who discharges it or takes steps towards its discharge, must be presumed to have acted within the scope of his authority, so as to bind his principal.

The taxt-book writers are equally clear on the point under consideration. Coulson in his law relating to Waters says thus:-

"The King has probably from the very earliest times had a duty as part of the prerogative to defend the realm against the waste of the sea, and to order the construction of defences at the expense severally of those who are to be benefited by them. The power to erect a sea wall or embankment as a protection against the sea, or from the influx of the tide in rivers, is one of these things which emanate from the prerogative of the Crown for the general safety of the public: and no doubt the ordinary rights of property must give way to that which is done for the protection and safety of the public, but only to the extent to which it is necessary that private rights and public rights should be sacrificed for the larger public purposes - the general common weal of the public at large."

Again in Halsbury, we find the following pagsage:

"It is part of the prerogative, and is the duty of the Crown to preserve the realm from the inroads of the sea by appropriate defences and every subject has a right to have the duty performed but the Courts are powerless to enforce it". Hailsham Edn. Vol.XXXIII. p. 545).

From the authorities quated above, I am clear it is the legitimate function of the Government to undertake and bear the cost of construction of the protective works necessitated by erosion from the sea.

I do not think that the principle can in any way be different in the case of rivers, strears, and other water-courses. If it is the legitimate function of hhe Government to protect the realm from the inroads and oncroachments of the sea, it is, I think unreasonable to hold that it would not be a proper function of the Government to protect the land against the encroachments of tidal navigable rivers and other water-courses. In fact, Coulson, in laying down the law, has referred to inflm of tidal rivers along with encreachment of the sea and has made no distinction between sea and river.

Regarding water-courses which are scurces of revenue to Government the duty of the Govt. seems to be clear. They are bound to construct at theri cost protective works so as to prevent damage to adjoining land. Water-Courses which are, or are connected with, works of irrigation and adjacent lands appertaining to such works are not even vested in the Municipal Council or other local bodies. In the circumstances,

it does not seem proper on the part of the Government to shift the responsibility on to the local bodies.
It may be that the Government are entitled to claim constribution from the local bodies, but this fact will not absolve the Government from their primary responsibility in the matter.

Sub: Works - Erosion from the Sea, rivers etc. - Preventive measures - Protective works - Responsibility to Government.

Ref: Memorandum No. 17220.2 F dated 31-5-1949, L.S.G.

No. 28/10-7-1949.
CONFIDENTIAL.

Sri K. Kuttikrishna Menon, (A.G.). The first qeustion referred to me is 'whether the restoration of tanks proposed by Mysore has to be considered as a repaid work with reference to clause 1(3)(a) of the 1892 agreement if the quantity of water to be impunded or the area to be irrigated is not more than the quantity impunded or area irrigated at any time prior to the proposed work or only if the quantity to be impunded or the area to be irrigated does not exceed that which actually obtained in any of the 20 years preceding the work". Clause I(3)(a) of the agreement of 1892 states that 'the repaid of irrigation reservoirs shall include increase of the level of waste weirs and other improvements of existing irrigation reservoirs or tanks, provided that either the quantity of water to be impounded, or the area to be irrigaged is not more time the quantity previously impunded, or the area previously irrigated by them' and clause 1 (4) says that 'any increase of capacity other than what falls under repaid of irrigation reservoirs as defined above shall be regarded as a "New Irrigation Reservoir". The point for consideration is whether the expression 'previously used in clause 1(3) (a) of the agreement means, at any time previous to the improvements proposed or at any time during the previous twenty years. There is nothin in the clause itself to restrict the period to the previous twenty years. I take it that the period of twenty years has been suggested, because, to perfect a title to easement by prescription, the requisite period of enjoyment is twenty years. There is, in my view, no warrant for importing this idea into the agreement which is in itself plain and unambiguous. I am, therefore, clear that the restoration of tanks has to be considered as a repair work, if the quantity of water to be impunded or the area to be irrigated at any time prior to the proposed work.

There is one consideration which, in my opinion, goes to the very root of the matter. In order to acquire a right of easment against the Government under the Indian Easments Acts, the period of enjoyment is sixty years, I take it that the law is the same in Mysore. It would, therefore, seem that in order to acquire a right of easement as against the Mysore Government, the necessary period of enjoyment is sixty years. In this view, the period of twenty years ceases to have any importance at all in the consideration of the points at issue between the two Governments.

The second question raised is whether, even if the proposed work has to be considered as a repair work, the Madras Government should object to it on the ground that it affects the prescriptive rights acquired by the Government of the waters not used by Mysore for more than twenty years preceding the proposed work. The period of twenty years will have to be altered into one of sixty years for the reason given in the previous paragraph. The agreement makes no reference to the prescriptive right in cases of repair work. Clause III of the agreement merely states that in cases of construction of new irrigation reservoirs the Madras Government shall be bound not to refuse such consent except for the protection of prescriptive rights already acquired and actually existed. In other words, the Madras Government shall be bound to give such consent if their prescriptive rights will not in any way be affected. The clause has no reference to 'repair work' and in the absence of any provision in the agreement, the matter has to be decided according to the general law. It seems to me that if the Madras Government is in a position to establish their prescriptive right, there is nothing in the agreement which would prevent them from objecting to the repair work on the ground that it would interfere with their prescriptive right. But it is a fundamental rule of law that any person, asserting that he has acquired a title by prescription or adverse possession, has to prove strictly all the elements necessary

necessary to constitute adverse enjoyment. No duty is cast on a person objecting to any such claim to prove that the claimant has not been in enjoyment for the requisite period. The person putting forward the prescriptive right cannot ask his adversary to prove the negative. He has to establish his case and cannot depend on the want of proof on the part of his opponent.

The third question referred to me is whether it will not be in order for Madras to ask Mysore to prove that the proposed extent of irrigation under the tanks is not more than the extent irrigated in any one of the years during the preceding twenty years. Madras Government can tell Mysore Government that the extent of irrigation should not be increased in such a way as to interfere with the prescriptive right of the Madras Government, whibh they may have establised by enjoyment for the prescriptive period. By virtue of the definition of 'repair work', contained in clause I(3)(a) of the agreement, the Madras Government can also insist that the quantity of water to be impounded or the area to be irrigated is not more than the quantity impounded or the area irrigated at any time prior to the proposed work. Madras cannot, in any event, ask Mysore to prove that the proposed extent of irrigation under the tanks is not more than the extent irrigated in any one of the years during the preceding twenty years.

Sub: Irrigation - The Madras Mysore Agreement of 1892- Restoration of Chencharayanapalli Uramundinakere and Narasalapalli Devarakere - Permissibility without the consent of Madras.

Ref: Memorandum No. 875-J/48-4, dated 30-5-1949.

Sri K. Kuttikrishna Menon:- Explanation 2 section 2(h) of the Madras General Sales Tax Act is to the effect that even though the transaction of sale does not, according to the provisions of the sale of Goods Act, take place within the Province, it must, nevertheless, be deemed to have taken place within the Province for the purpose of levying the sales tax. In other words, the Legislature by resorting to this legal fiction seeks to impose tax on sales which are really effected outside the Province. The question for consideration is whether this action of the Local Legislature is 'intra vires' its powers

According to Sections 99 and 100 of the Government of India Act, the Provincial Legislature has power to make laws only for the province or for any part thereof and only with respect to matters enumerated in the Provincial and Concurrent Legislative Lists. No provincial law can have extra territorial operation. In the Provincial legislative list entry 48 is ' tax on the sale of goods and advertisements' 'If the sale of goods takes place within the Province the Provincial legislature has power to impose taxes with reference to it; but if the sale is effected outside the province, the local legislature will not have the power to impose a tax. If it imposes any such tax, it would be making law inrespect of something which takes place outside the presidency. In other words, it would be arrogating to itself extra territorial jurisdiction. It may be that the goods are within the province or that they are produced or manufactured within the province; but as the tax imposed is not on posession of the goods or on preduction or manufacture of the goods, which takes place within the province,

but as the tax imposed is not on possession of the goods or on production or manufacture of the goods, which takes place within the province, but on sale which is effected outside the Province, it cannot be said that the local legislature, in imposing the tax, is legislating for the province. I am, therefore, of opinion that the fact that the goods are within the province or that they are produced or manufactured within the province, would not give the provincial legislature competence to levy sales tax.

I am fortified in the view that I have set out above by the observations of the Federal Court in 'In Re. C.P. Motor Spirit Taxation Act" - II, Federal Law Journal page 6, where their Lordships have explained the scope of the words "taxes on the sale of goods", appearing in entry 48 of list 2 of schedule 7, Government of India Act.

Tax - The Madras General Sales Tax Act, 1939 - Definition - Explanation (2) under section 2(h) of the Act - Legal Validity.

Ref: Memorandum No. 25721 H/49/6 dated the 4th June 1949, Revenue Department.

No. 30/10-7-49.

Sri K. Kuttikrishna Menon:- I have examined the speech with care and I find that it is a long tirade against the Madras Government as at present constituted and against the Brahmin Community. In my view, the speech is actionable both under section 124-A and under section 153-A of the Indian Penal Code.

In forming an opinion about the character of a speech, the speech must be taken as a whole, without giving undue weight to inclated passages here and there and without stressing an objectionable sentence here or a strong word there. Read as a whole the speech 'brings or attempts to bring the Government into hatred or contempt, or excites or attempts to excite disaffection towards the Government', within the meaning of section 124-A. A recent decision of the Privy Council did not accept the view of the Federal Court that Public Disorder is the fist of the offence. According to the Privy Council, actual incitement to rebellion, outbreak or forcible resistance to the authority of the Government is not necessary. It is sufficient if the speech is calculated to bring into hatred or contempt the Govt. which is established by law (1947 M.W.N. 226)

Applying the above test laid down by the privy Council, I am of opinion that the speech as a whole has a tendency to promote hostility and ill-will to Government. To make the position clear, I would refer to some passages in the speech.

In page 1 of the English translation of the speech refering to the Governmental authorities, there is the following passage:

"They have given good facilities to all others in whom they are interested - to those who have commited offences of stabbing and theft."

In page 6, after the reference to the election of the new Premier, the speech contains the following passage:

"There will be no longer any single sphere in which corruption is not rampant. You shaould not think that I am casting any aspersion on Sri Kumaraswami Raja. Hereafter nothing will be done in Government offices in regard to any records or applications without offering presents."

Then agains after refering to the President of the Tamil Nad Congress Committee, his friends in the Legislature and the ministers who are in his support, the speech proceeds thus:

"Now every Minister has property to the extent of 10 or 20 lakhs of rupees and the members of the Tamil Nad Congress Committee have 5 or 6 lakhs of rupees. Where did they get this from? Which river floods brought it to them. These dishonest Brahmin papers are mocking at us. If I had been born to a single father, should I not feel sorry if the wealth and money of the people of this country are plundered by congressmen and the Ministers? How many dishonest officials have now been cought in the hands of Ramaswami Reddiar? The officers who are in receipt of a pay of thousand and two hundred rupees have thus been caought for having received brides. All these persons are going to the discharged tomorrow itself. All their knovery is going to be protected."

After a few more sentences in the above strain, there is the following passage:

"We can as well call this a plundering administration."

Then again, we find the following:-

"In the Banquotting hall iniquitous things are taking place for deciding as to whoshould be appointed ministers and who should commit plunder and in what manner. If they have even the least sense of shame, they should stop conducting the administration, fall at the feet of the white men amd akk them to come back to this place.

The above passages, taken along with the whole speech, are, in my view, sufficient to show that the speech brings or attempts to bring into hatred or contempt or attempts to excite disaffection towards the Government established by law. I am therefore of opinion that the speech is actionable under section 124-A I.P.C.

The essence of the offence under section 153-A is 'malicious intention' and the question for consideratio is this: can it be said that the speaker in the present case had any malicious intention of promoting hatred against any class of His Majesty's subjects? It is treut that the use of exagerated or unbalanced language is not sufficient and that the section was never

never intended to apply to the case of an honest agitator, whose primary object is to secure redress of certain grievances, real or facied, and who is not actuated by the base mentality of a mere mischief-monger If the speech is insulting and provocative to a particular class and likely to create bad blood, the speaker must be held guilty under the section. The speach seems to me to be a sucrrilous attack on the Brahmins and I need refer only to one passage in the speech to make the position clear:

They are committing plunder in every place and in every sphere, including the Governor-General's post."

In my view, the speech taken as a whole promotes or attempts to promote feelings of enmity or hatred between different classes of His Majesty's subjects, within the meaning of section 153-A, and is therefore actionable under that section also.

Sub: Law & Order - Madras City - Anti-Hindi Meeting held on the Island Grounds on 31st March 1949 - Objectionable speech of Sri E.V. Ramaswami Naicker.

Ref: Memorandum No. 2005/49-5 dated 11-6-1949, Public(General-A) Department.

No. 31/10-7-49.

K. Kuttikrishna Menon. The explantion to article 35 of the Stamp Act (II of 1899) says that a mortgagor who gies a lease of of the property mortgaged or part thereof, is deemed to give possession within the meaning of the article. The question for consideration is whether a person who, after granting a lease of certain property, gives a simple mortgage over it at some time subsequent, can be said to comewithin thee xplanation above mentioned. As the lease was granted sometime prior to the mortgage, it is difficult to hold that the mortgager gives the lease within the meaning of the explanation. Even if there is any doubt regarding the interpretation, the benefit of that doubt must be given to the subject, the Stamp Act being a texing state. I am, therefore, clear that the cases of the kind referred to in the memorandum cannot be held to come within the explanation and therefore do not fall within clause (a) which speake of possession being given to the mortgages but fall within clause (b) which speaks of such possession not being given.

The Inspector-General of Registration apprehends that persons are likely to evade payment of duty by executing the lease deed in the first instance and deeds of simple mortgage at a later date and that heavy loss is likely to result to Government under stamp revenue. In the circumstances, I think it is desirable to amend explanation under the article, so as to bring also cases of the kind referred to in the memorandum under clause(a)

Sub: Stamp Duty (Madras-Chingleput) Document treated as mortgage with possession - Instead of simple mortgage - Instructions.

Ref: Memorandum No. 74055-JK/48-6 dated 8-6-49 Revenue department.

ADVOCATE GENERAL'S OPINION NO. 32, DATED 10TH JULY 1949.

The Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 - Section 40 - Payment of portion of compensation in advance - Framing of rule.

D.O. No. 38010 J/49-2 dated 23-6-1949, Revenue Department.

Section 39(1) of the Madras Estates (Abolition and Conversion of Ryotwari) Act of 1948 provides for the determination of the total compensation payable in respect of each estate, and section 14(1) says that the Government shall deposit in the office of the Tribunal the compnestaion in respect of each estate as finally determined under section 39. Section 53 further provides that all payments made out of the compensation deposited in the office of the tribunal under section 41 shall be made by it in accordance with its orders and decisions, subject to modifications, if any, made on appeal under section 51. From these provisions, it would appear that th Act does not contemplate payment before the compensation is finally determined and before the Tribunal decides who all are entitled to payment and in what proportion. Any rule framed under section 40, enabling the Government to pay a certain proportion of the compansation in advance at or about the time of the notification of the Estates, would, I think, contravene the provisions of the Act and would therefore be held invalid

2. If the Government want to pay any portion of the compensation in advance, their object can, I think, be achieved by entering into an independent agreement with the land-holder The amount of advance under the agreement should be in the nature of a loan and a charge over the compensation payable to the landholder should be created in favour of the Government for the repayment of the loan.

(True Copy)

No. 33/18-7-49.

Sri K. Rajah Iyer. I am of opinion that the amounts collected by a dealer by way of sales tax from his customers cannot be treated as furming part of his turnover after the enactment of section (B) of the Madras General Sales Tax Act, 1939, Clause 2 of that section shows clearly that the dealer, when sellecting the tax, does so only as agent of the Government. It imposes an obligation upon him to pay over to the Government all the amounts so collected in excess of the tax, if any, paid by him. Therefore, the collections cannot be treated as forming part of the turnover though there a nothing in rule 6 of the Madras General Rules Tax (Turnover and Assesment) Rules, which provides for the exclusion of such amounts. The definition of the expression "Turnover" in section 2(1) is nbt so wide as to embrace even taxes collected on behalf of Government. The tax cannot now be said to form part of the aggregate amount for which goods are either bought or sold by a dealer though it was possible to take such a view before the enactment of section 5(B).

Sub: Tax-The Madras General Sales Tax Act, 1939 - Sales Tax Collected by the dealer - Inclusion i his turnover assessable to sales tax - Objection.

Ref: Memorandum No. 808-M/49/6 dated 20/6/1949, Revenue, Department.

No. 34/29-7-491.

hmxf

Sri K. Rajah Iyer. It may be a matter for consideration, how far the interference with the administration of Wakfss and Wakf-al-al-aulads, particularly providions like sections 19, 48 and 50 (1)(f) will be within the competence of the provincial legislature in the face of the Articles on Fundamental Hights in the Indian Constitution as and when they come into force. Subject to this, the Bill appears to be in order, and I have no special remarks to make on its principles and provisions.

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Sub: Madras Wakf Bill, 1947 (L.C.Bill No. 3 of 1947) introduced by Mr. Abdul Latif Farookhi Sahib - Opinion.

Ref: D.O.No. 5332/47-15. H.L., dated 12-2-1949, of the Secretary, Legislative Council, Madras.

Sri K. Rajah Iyer. "Mortgage deed" as defined in section 2(17) of the Indian Stamp Act is much wider in its import than 'mortgage in the Transfer of Property Act. No transfer of any interest in immoveable property is necessary under the former. Creation of a right in favour of another is enough. But of course to satisfy the definition, there must be two requisites, (1) creation of a right over property and (2) the property must be specific. Turning now to the document in question, we find that it is styled 'Agreement for hypothecation of goods". But this is not conclusive as to the nature of the transaction though it may be taken into consideration if the terms of the document are ambiguous. There can be no question that the document before us creates a charge, over all the properties set out in para (1) comprising fixed and floating assets. Some of the assets are not specific no doubt but others are. These assets are motly moveable but the document in express terms states that the assets comprise land, buildings and premises bearing door No. 27, Tiruvothiyur High Road, Madras. This is very specific. They are not included in the Agreement of hypothecation of even date and so there is no scope for contending that the expressions save those referred to in the agreement of hypothecation agreement of even date. The molicitors for the borrower have suggested that it was not intended to create a charge over immoveable propert and the circumstances that the document has not been presented for registration under the Registration Act has been relied on. It may be so. But the expressions used, gramatically construed, can lead to no other conclusion than that a charge was created on immoveable properties also whether intended or not. The allegation that the title deeds of the preperty have already been delivered to the

company and that an equitable mortgage might easily have been created without payment of any stamp duty has, for similar reasons, no relevancy in this context. Nor can the fact that the document was not registered affect the question of stamp duty le iable under the Act. It may, however, be pointed out that the time for presentation of the document for registration had not expired at the time it was presented to the Asst. Registrar of Joint Stock Companies. The borrower cannot get over the liability to pay the proper stamp duty by merely alleging that the opening portion of clause 18 of the agreement is 'slackly' worked. It does not appear that there was ever any application for removing the effending words.

My view, therefore, is that the document in question is liable for duty as a 'mortgage deed'. The result may be hard on the parties and unfortunate, especially, if such a consequence was not intended, but the legal opinion cannot be otherwise.

Sub: Stamp Act - Document purporting to be an agreement of hypothecation of goods etc., treated as Mortgage deed-Levy of deficit duty and penalty - Refund application of Messrs Cromption Engineering Co., Ltd.,.

Ref: Memorandum No. 16971 d K/49-6 dated 16th July 1949. Revenue Department.

Sri K. Rajah Iyer. It is difficult to say that the speech read as a whole is actionable either under section 124-A or section 153-A of the Indian Penal Code. But there are passages of which it can be said that they tend to instigate and incite persons to use criminal force or violence and to commit mischief. The passages which I have in view are the following:--

1. " If the People were really spirited, they should have hanged Arunachalam Pillai in the neighbouring tree. Failur to do is your mistake."

2. "The land belongs to those that till. But by our sending petitions and representations to the Government that the land belongs to those that till, no fail to realise that it belongs to us alone. If the land belongs to us alone, it is not preper to send peitions and representations to the Government like that. We should realise that we are the owners of the land and act accordingly. It is not honourable for us to beg. We who rule a State should not adopt that method. If you should receive it only by begging, you should go to the Congress. You should receive what the Congress is pleased to give. We are not Con ress officials. We are not Government servants. There is not reason why we should mislead you. What we can tell you is only this: You should fight"

3. "What I tell you is this: Be courageous, resolute and firm. Seize your land. Do not leave your land. If the law is against it, let the law be changed. You need not give up the right to till the land'. People of the village die, the other half should obtain justice. They should secure the right. Let policement shoot hundred persons. Let them shoot a thousand persons. Justice will be obtained only if your blood mixes with this soil. Now the peasants in our province secured the right over the land was - blood flowed freely - blood mixed with soil. They suffered like that and they obtained possession of the land. What I tell you is this: 'by your agitation, this Tamil Nad, your motherland, will benefit gradually. The people themselves will throw out these Ministers, the present Government. If you are not prepared to shed your blood and protect your land, be the slaves of the Ministry. Make your descendants also laves. When you come to me, you need not come weeping like women who have lost their husbands. What I tell you hs here is, to whatever paety they may belong, there is an excellent opportunity for them towork for the peasants."

4. "The land belongs to the tiller. While so, we pay reasonable lease amount. You should seize the land boldly, resis on you and you should not go and stand before the collector and ask for 45-55 basis."

5. "A state of affairs has not yet been reached in which you can say that the land belongs to you. I am leaving Tamil Nad with the sorrowful feeling that youths have not yet developed spirit. When I went to Vilampatti today, the Harijans stated with tears in their eyes that the 32 acres of land in their possession had been wrested from them. When they said that they had no means of livelihood, I became vexed for the reason that, although I was a big leader, I am not able to give them any help or do anything whatever. What I request the youths here is that they should carry on an agitation for enabling these Harijans of Vilampatti to secure all the 32 acres of land. The officials and facilities like courts - all these exist only for the big landholders and not for the poor people. That is why I ask you not to go to the Ministers, Government Officials or courts. There is no use of asking them. You should carry on a big agitation We carried on a big agitation like t at in Bihar Province. In it, teachers, students, vakils - all - took up the plough and ploughed. They shed blood. By carrying on a struggle in all these ways, by carrying on an agitation and by shedding blood, they have catablished the principle that the land belongs to the peasants. Our youths should come forward boldly to carry on a struggle and to restore this land to the peasants."

Action can be taken under section 9-B(1) of the Madras Maintenance of Public Order (Amendment) Act, 1948, in respect of the above passages.

Sub: Law and order - Mathurai district - Public meet ng held at sholavandan on 21-5-1949 - objectionable speech of Sri Ramanandan Misra.

Ref$ Memorandum No. 3219/49-7 dated 25-7-49, Public (General A) Department.

Sri K. Rajah Iyer. I am inclined to take the view that the election of Mr. B.A. Murthi is void and can be declared as such by the Government under the 2nd proviso to section 51(2) of Madras City Municipal Act. The provisions of section 51(2) are mandatory in as much as it is expressly provided that no servant of the Crown shall be qualified for election or for holding office as Councillor. The proviso to the section does not postulate any specific method by which the question of disqualification should be raised and therefore it would appear to follow that the matter is one which can be raised by anybody and brought to the notice of the Government. The question can arise either before or after the election and no period of limitation is prescribed; and the Government is the sole and exclusive authority to determine the question. Taking all these into considerations it seems to follow that once the question is raised, the Government is bound to adjudicate thereupon and if its decision is that the candidate is disqualified, the election must necessarily become void. The disqualification applies equally to the 'election' as well as to holding office'; and it will therefore be no answer to sat that to-day Mr. Murhhi can lawfully hold office. If he was not qualified for election, he never became a councillor and cannot be legally holding office (vide observations of Ananthakrishna Iyer J. in 54 Madras 627 at pages 651 and 652).

The election rules expressly begin 'save as otherwise provided, no election . . . . shall be called in question These words are sufficient to attract to section 51 and section 54 of the City Municipal Act and it cannot be said that an election petition is the only remedy by which an elected candidate's election can be questioned or nullified.

Sub: Election - Corporation of Madras - Sri B.A. Murthy elected for Chintadripet Division - Disqualification.

Ref: Memorandum No. 42721-10B dated 29th June 1949, Local Administration Department.

Sri K. Raha Iyer. A prosecution is, in my opinion, not advisable in this case. For an offence under section 295-A of the I.P.C., there has to be not only a deliberate but also a malicious intention to outrage the religious feelings of a class of His Majesty's subjects. The words complained of have to be spoken or written with the said intention to insult the religion or religous beliefs of that class. What is punishable is not so much the subject matter of the writing as the manner of it. The essence of the offence is that the insult to religion or the outrage to religious feelings must be the sole or primary or at least the deliberate and conscious intention and that prompted by malice. The expression 'outrage' used in the section is a much stronger term than 'wound'. In Murray's dictionary 'outrage' is explained as 'to wrong grossly, treat with gross violence or indignity'. Malice implies absence of good faith. Honest expression of opinion is no offence, however wounding such opinions may be to the religious beliefs of another person or class of persons. A writer cannot be convicted of an offence under the section w here it is possible that he may have without any malicious intention and honestly, though reprehensibly in the opinion of the Court, thought that he should express himself in the form in which he did with a view to bring about a reform. Moreover, under the section the intention to outrage mustbe directed to a class of persons and not merely towards an individual or individuals. A vague indefinite body, even though given a name, may not be considered as a class by itself, particularly if individuals overlap indiscriminately. It must be a definite and ascertainable class of His Majesty's subjects.

As has been observed in 50 all 157 I.L.R, in countries where there is religious freedom, certain

latitude has to be conceded in respect of the free expression of religious opinions together with a certain measure of liberty to criticize the religious beliefs of others. But that 'Liberty' to criticize should not be abused and vile and abusive language indulged in. It is possible to conceive of the writing of a reasoned, critical and strong attack on a religion or its founder or some of its beliefs, written by way of comment on that religion or its founder with a view to induce persons to forsake that religion for another, though the language employed may would or be apt to injure the feelings of orthodox followers of that religion or liable to be construed as an insult to their religious beliefs. But unless such writing has been resorted to with the malicious intention of outraging the religious beliefs of a definite class of people, no prosecution can successfully be launched. A.I.R. 1927. Lah. 591.

Books and Publications - Tamil book entitled "Kaduvala Kamuhana?" - Objectionable - Opinion.

Ref: Memorandum No. 2426/49-2 dated 19-9-1949, Public (General-A) Department.

No. 39,.

O P I N I O N.

Sub: Madras Preservation of private forests Act - Waste lands containing trees and shrubs - Treatment as forest - Clarification.

Ref: Memorandum No. 699-M/49-5 dated 20-9-49. Revenue Department.

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"Forest" as defined in section 2(a) of the Madras Preservation of Private Forests Act, 1946, icludes within its connotation also waste or communal lands containing trees and shruts, Pasture land and any other class of land declared by the Government to be a forest by notification in the Fort St. George Gazette. The definition does not purport to be an exhaustive one and so what would orginarily be regarded otherwise an forest not be excluded from the scope of the Act. "Forest" generally understood, is a large tract of land covered trees and undergrowth or any great or vast wood. Se p. Ramanathier's Law Lexicon P. 457. I think the Board of Revenue was quite right when it took the view that merely because there were no shrubs in the land but only trees the land will not cease to be a forest under the definition

OPINION.

Sub: Forests - East Godavari Agency - Kurmagondi-Mokhasa Forest-Resumption.

Ref: Memorandum No. 57663 CI/47-30 dated 19-9-49, Development Department.

It has been observed in the statement of facts sent me that the Kurumagondi Modhasa in the East Godavari Agency Comprises an area of 100 acres of cultivable lands and 900 acres of forest. The grant of this village to Madhuvidi Yerram Raz has been confirmed by a sanad issued on behalf of the Governor-in-Council on 16th September 1879. This Sanad is general in its terms and does not restrict the title of the grantee to the cultivable lands. The grantee appears to have been in possession of the entire area even praviously. No doubt the grantee became entitled to the village apparently under agrant from the Muttadar of Mohanapuram, who, in his turn, was only a sort of under -tenure holder under the Mansubdar of Rampa. All these were only service tenures and the Government were entitled toresume them. When the grant to Mansusbadar was resumed under G.D. 109 dated 16th January 1880 and G.O. 103 dated 3rd February 1890, the main tenure as well as the undertenures ceased to exist and the entire property became vested in the Government. But by virtue of the Sand issued to Madhuvidi yorram Rax as a reward for his loyalty and the Assistance he had given to the Government during the Rampa Rebellion, the Mukkhasadar acquired an idependedant title to the village. The answer to the question whether he was entitled to the forest lands also would therefore depend upon the terms of the grant and unless it appears from the terms of the grant or the surrounding circumstances that any particular area in the village was excluded from its scops, the grantee would prima facie be entitled to

the entire village. But in 1890 the Government declared that the Rampa forests were the property of the State and that the Muttdhars should not lease any right in the forests for felling timber etc. as they had no right to them. The G.O. in question (No. 103 Revenue dated 3-2-1890) would appear to deal only with the title of the Muttadhars and not of this Mukhasadar as even in the statement appended to G.O. 433 Revenue dated 20-6-94 only the name of the Mittadar of Mohanapuram is shown as against Kumara Goddi and not that of Yerram Raz, the Mokhasadar, However that may be, in view of the clear declaration of the Government in G.O.Ms. No. 103 dated 3-2-1890 that Rampa forests vested in them and no in the Muttadar, that forests were never granted to them under the sanad, it may not be possible for the Mokhasandar now to assert successfully that he has title to the Forests.

But a mere declaration of the Government that the forests were theirs cannot amount to dispossession. That the Mokhasadhar was previously in possession, appear to be conceded. Even in the letter No. 2131/47-1 dated 6th June 1947 of the Secretary, Board of Revenue, Madras to the Additional Chief Secretary to Government, Public (Political) Department, it has been stated that all the Rampa forests except the Kurumagendi forest were taken possession by the Government. It is not stated that the Government ever took possession of the Kurumagondi forest. On the other hand there is evidence that since 1906 at any rate the Mukhasadha was in acutal enjoyment. Ig it can be proved by clear evidence that the Mokhasadar was not in enjoyment from 1890 to 1906. But from the statement of facts furnished, it would seem that the Mokhasadar has been in actual enjoyment for ever 60 years and has therefore acquired a title by prescription. Mr. W.R.S. Sathinanadan also has reported to the Government that the Mokhasadar was in enjoyment for over 60 years. The Makhasadar was issuing permits in form No. 2 on the supposition that he was legally

legally entitled to the forest and that he was in possession. The burden of proving that the admission of title was made under a mistake will be heavily on the Government. So if the Mokhasadar is to be deprived of this right now without any compensation being paid to him the Government may be involved in a litigation, and it may prove in the end to be unfavourable. I am, therefore, of opinion that withholding of permit to Mokhasadar without payment of compenstion will not be advisable under the circumstances detailed in the memorandum.

(Sd.) K. Rajah Iyer
ADVOCATE - General.

O P I N I O N.

Sub: Madras Act - Certain provisions - Whether affected by the decision of the Federal Court in Jatindra Nath Gupta vs. Province of Bihar and others.

Ref: Memorandum No. 11534/49-1 dated 10-9-49, Legal ~~Department~~ Department.

The recent judgment of the Madras High Court in Crl. M.P. 1529/49 etc. concludes the question raised in the memorandum. It has now been held that even a bare power to extend the life of an Act is a legislative power which cannot be validly delegated by the legislature to any other authority. The power to modify the provisions of an Act while extending it to a particular area would also be invalid, unless the power conferred merely authorise the executive authority to apply in its discretion any part of whole of the law as enacted by the legislature, to much area. In this view section 54-A of central Act XXIV of 1859 and section 206 of the Madras Local Boards Act, in so far as they confer a power to modify would be invalid. The validity of section 4(o) and (p) and section 39 of the Town Planning Act can, however, be supported on the principle that the sole purpose of the Town Planning Act being to provide for the bringing into existence of town planning schemes in accordance with the objects of Act, it would be necessary to provide for the conflict which may incidentally arise between such schemes and existing provisions of other Acts.

The power, if any, conferred on the Government to repeal or suspend the provisions of an Act would beregarded as a nalogous to these which give power to the Government to bring an Act in to force on such day as they may appoint and would, therefore, be regarded as alegislative power and cannot validly be delegated.

Judged by these tests, the provisions of Madras Act XXXIII of 1947 and Madras Act II of 1948 will be valid. Section 3 of Madras Act IV of 1948 merely empowers the Government to cancel the suspension of operation of Madras Tobacco (Taxation of Sales and Licensing Act), 1939 and on such cancellation the said Act comes into force by virtue of the legislation itself and not by virtue of the ntification

notification of the Government. That would appear to be valid.

Sd. K. Rajah Iyer.
ADVOCATE - GENERAL.

No. 46/11-11-49.

Sri K. Rajah Iyer (A.G.). The dtermination of the scope of the latter part of section 33 is not free from difficulty. If emohasis is to be laid on the words "except for misconduct not connected with the dispute" and this exception is construed as governing theextent of the juriddiction of the Tribunal to entertain applications for discharge etc., of workers during the pendency of the proceedings before it, then it will have to be said that no employer can discharge or dismiss or in any way punish his workmen during the pendency of the proceedings before the Tribunal without its express permission save for misconduct not connected with the dispute. That would mean that no employer can discharge his workmen is such circumstances even as a measure of retrenchment except with the Tribunal's permission. The Trinunal would, therefcre, have jurisdiction to entertain such applications and the view to the countrary taken by the Industrial Tribunal, Vijayawada would require reconsideration.

That such an interpretation is possibly the correct one receives support from the circumstance that all 'lockouts' during the pendency of proceedings before the Tribunal have been declared illegal under sections 23 and 24 of the Act an made punishable under section 31(2). It would be reasonable therefore to assume that the legislature in order to mitigate the hardship of such an absolute prohibition, conferred under section 33, a jurisdiction on the Tribunal to permit discharge etc., of workmen in certain circumstance set out in the latter part of the section. Any other construction would lead to an anamoly viz., that while section 33 would permit an employer to discharge workmen for want of work without the permission of the Tribunal, sections 23 and 24, read with section 31(2), would render such action punishable nevertheless.

It is necessary at the same time to point out that there is something to be said in favour of the view taken by the Industrial Tribunal, Vijayawada. It can be contended that section 33 read with section 31(1) imposes a penalty and therefore should be construed strictly, and that on the plain and literal construction of the section, no offence under section 31(1) can be held to have been committed when an employer dispenses with the services of some of his workmen for want of work. The section, it may be argued, prohibits only discharge or dismissal of workmen as a punishment, the words 'otherwise punish' lending support to such a construction. The result will then be anamoly viz., while the action of the employer will not be punishable under section 31(1), it will be punishable under section 21(2) The inclination of my mind is towards the former view, but the matter can be set at rest only by an authoritative ruling of the High Court.

Sub: Labour - Trichy - Srirangam Transport Co., Ltd., Tiruvanaikoil, Tiruchirapalli Dist.-Retrenchment of 8 workers during the pendency of adjudication proceedings - Prosecution of the Management of the Company.

Ref: Memorandum No. 91669.PI/49-2 dated 19-10-49, Development Department.

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Sri K. Rajah Iyer(A.G.). The article undoubtedly contains passages which are highly objectionable and which do tend to bring the Government into hatred or contempt within the meaning of section 124-A. If the question had arisen before 1947, I would unhesitatingly have given my opinion in favour of a prosecution under section 124-A or section under the Indian Press (Emergency Powers) Act. But though the sections remain the same and unaltered, and, strictly speaking, the earlier decisions are still applicable, the recipt tendency of courts has undoubtedly been to give a greater liberty (almost hordering on licence) to criticism of the Government and its actions: and this, on the principle that India is to-day a democratic country and attacks upon the Government with a view to refort it or to change it, must inevitably have some tendency to rail feelings of disaffection or hatred or contempt towards the Government. But even now, it is clear that there is and ought to be a line of demarcation between liberty of speech and its abuse. Speaking for myself, I am inclined to think that in the case on hand, the border line has been crossed, and that even giving the fullest intitude to the occasion and the nature of the topics dealt with, it was wholly unnessary to attribute motives to the Government and its members that too in suc intemperate and scurrilous language.

Having said all this, I must point out that the question, whether in this particular case, a prosecution should be launched or action should be taken under the Press (Emergency powers) Act, is essentially a question of policy for the Government's consideration. On the one side, it may be considered that here is an appropriate case in which the question of principle might be tested because of my opinion expressed regarding the nature of the offending passages is the article; but on the other hand, it may be felt that after all, the article is nothing more than a symposium of what

been said by other people on other occasions and in other places much to the same effect, and that a prosecution directed against this paper now would only serve to revive the topics and focus public attention on what might be better left to die a natural death.

Sub: Books and Publications - Telugu book let entitled "Andhra Congress - Rebel Congress" Objectionable.

Ref: Memorandum, No. 2260/49-3, dated 31-10-1949, Public (General-A) Department.

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/True Copy/

Copy of Memorandum No. 3023/49-3, dated 8th November 1949 to the Government Solicitor.

Sub: Newspapers - "Aruna", a Kannada Weekly of Mangalore - Issue dated 18th September, 1949 - Objectionable - Opinion.

A copy of an article under the caption "Let there be an impartial enquiry into the dealhs in Jails" which appeared in the "Arna", a Kanada weekly of Mangalore is sent herewith to the Advocate-General, Madras. It is considered that the article attracts section 4(1)(d) of the Indian Press (Emergency Powers) Act, 1931. The Advocate-General is requested to effer his opinion as to whether the demand of a security from the paper under the Act would be legally justifiable.

No. 48.

O P I N I O N.

Sub: Newspaper - "Aruna," a Kannada weekly weekly of Mangalore - Issue dated 18th September, 1949 - Objectionable.

Ref: Memorandum No. 3023/49-3, dated 8-11-1949 Public (General-A) Department.

* * *

I do not think that the article in question would attract section 4(1)(d) of the Indian Press (Emergency Powers) Act, 1931. The object of the article is mainly to draw the attention of the Government and the public to certain happenings in jails and to demand an enquiry. Though strongly worded, it cannot be said to exceed the bounds of legitimate criticism and I am of opinion that the demand of security from the above Weekly under the Act would not be legally justifiable, and is not likely to be upheld by the High Court.

* * *

/True Copy./

Sd.....
SUPERINTENDENT

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No. 49/16-11-1949.

O P I N I O N.

Sri K. Rajah Iyer (A.G.). It has been authoritatively laid down by their Lordships of the Privy Council in the case os Sally Wertheim vs. Chicoutimi Pulp Company, 1911 A.C. 301 at page 307 that it is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed. The law in India is not different and is to be found in sections 73 and 74 of the Indian Conteact Act. Under the former section, when a contract has been broken, the party who suffers by such breach is entitled to receive from the party who has broken the contract, compensation for any loss or damage caused to him thereby which naturally aross in the usual course of things for such breach or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. Under section 74, it is enacted that even where a sum in named in the contract as the amount to be paid in case of such breach or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled to receive from the party who has broken the contract only reasonable compensations; thus bye passing a most troublesome knot in the common law doctrine of damages, viz., whether the ~~in the common~~ sum named in the contract as payable in case of breach is a penalty or liquidated damages. It is clear therefore that the distiller in the case on hand can only claim the loss he has actually sustained (336N 494-1929 P.C., ~~less he has actually sustained~~ A.I.R.: I.L.R. 60 Cal. 1379 - 1934 Cal. 285). According to his own statement the cost of manufacture of arrack per gallon is Rs. 4/4/- and the State agreed to pay him at Rs. 5/- per gallon. The loss to him in therefore annas 12 per gallon ~~xxx~~ and he is entitled only Rs. 375/- for 500 gallons per month for the period during which the distillery was closed or may hereafter he directed to be closed.

In my view, the case on hand is not ~~xx~~ governed by clause 6 of the agreement at all but would appear to fall outside its acope and intendment. Clause 6, according to its true interpretation, does not arpear to cover the contingency which has happened. I presume that under the contract, the arrack manufactured by the distiller has to be sold only to the State. The State has in its turn agreed to purchase from him not less than 500 gallons per month and the distiller is in consequence bound to have that quantity ready for supply to the State every month. The contract, therefore, provides that in case of default on the part of the State to purchase the full quantity, the supplier is to be compensated to the extent of the cost of the quantity by which it falls short of 500 gallons. This contemplates the contingency of the supplier having manufactured 500 gallons and the State not taking that quantity. It is reasonable that in such an event, the supplier must be paid in full the cost of the entire 500 gallons. But where for any reason, the distillery itself is not allowed to be worked and the supplier does not incur any expenditure in manufacture, the measure of damages can only be reasonable compensation, viz., loss of profits at 12 annas per gallon. The measure of damages can only be under section 73 of the ~~Indian Contracts Act~~ and the 'cost' cannot furnish the guide for assessment.

Sub: Prohibition - Sandur - Introduction - Compensation to the distillery contractor.

Ref: Memorandum No. 18726-D/48-16 dated 4-11-49, Revenue Department.

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CONFIDENTIAL - SPECIAL
No. 50.

O P I N I O N.

Sub: Books and publications - Tamil Book entitled "Karunchattai Ozhiyavenduma"? - Objectionable.
Ref: Memorandum No. 2206/49.11 dated 8-11 dated 8-11-1949, Public(General-A) Department.

I consider that this is a fit case for action being taken against the keeper of the printing press in question under section 3(3) of the Indian Press (Emergency Powers) Act. Giving dur weight to the pronouncement of their Lordships in the "Dravida Nadu" case, I am inclined to think that the present article transcends the limits of permissible liborty in public writings. It is a violent, vituperative and scandalous attack on the Hindu religion and the religious beliefs of the Hindus and it cannot be justified as a legitimate criticism of a cult or system.

The article directly comes in my opinion within the scope of section 295A of the Indian Penal Code and if the Government is so pleased, it can take action under that section by directing a prosecution.

So far as the Indian Press (Emergency Povers) Act is concerned, I think that the article offends not only section 4(1)(h), but also 4(1)(d). The only technical difficulty which may arise is a possible contontion that both those sub-clauses refer to different classes of His Majesty's subjects and decisions have held that the classes referred to must be well defined and ascertainable classes. Clause (d) however contains as additional word "pr section of His Majesty's subjects" which can be contended, widens the scope of the owrd "class". But if I am right in thinking that the article is a calumny on the Hindu religion itself, then there will be no difficulty in saying that "Hindus" will form the class for purposes of section 4(1)(d) and(H).

Madras./21-11-1949.

Sd. x x x x
ADVOCATE-GENERAL.

CONFIDENTIAL.

No. 51.

O P I N I O N.

Sub: Books and Publications-Telugu Book entitled "Vajrayudham" - Objectionable.

Ref: Memorandum No. 3133/49-3, dated 14-11-1949, Public (General-A) Department.

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It may be rather difficult to sustain a prosecution against the author, publisher and printer of the book "Vajrayudham" under section 153-A of the Indian Penal Code; as, under that section, the offender must promote or attempt to promote feelings of enmity or hatred between different classes of His Majesty's subjects. Decisions have laid down that the classes contemplated must be clearly defined and easily ascertainable. See 57 Bom. 253 1941 pat. 132 A.I.R.: (1938) I Cal. 455. The words "Capitalist", "Masters" or "Exploiters" have been held in these cases to be too vague to denote a definite or ascertainable class, so as to come within clause (d) of section 4(1) of the Indian Press (Emergency Powers) Act. There is not even such a definiteness or description of the "Class" in the book in question as in II B 1937 Mad. 14 where, "mill owners" and "Zamindars" were the target of attack and it was held that the description was sufficiently precise tofall within the mischief of the section.

The article read as a whole offends section 4(1)(a) of the Indian Press (Emergency Powers) Act, as there is an open incitement to violence. It is not necessary that the words should tend to incite or encourage the commission of a particular offence of offences. It is sufficient if they tend to incite or to encourage the commission of cognisable offences in general. See 1941 Pat. 132 A.I.R. Action can therefore be taken under Section 4(1)(a).

The author can also be proceeded against under section 17(1) of the Criminal Law Amendment Act if it can be proved that he is a member of a unlawful association.

Madras/21-11-49. /True Copy/ ADVOCATE GENERAL.

Copy of Memorandum No. 3234/49-3, Public (General-A) Department, dated 15th November, 1949.

Sub: Newspapers and periodicals - "Jyoti", a Telugu fortnightly of tenali - Issue dated 10th September 1949 - objectionable - Opinion.

A copy of a translation of the objectionable portions in the story entitled "The change in life" which appeared in the issue of "Jyoti", dated 10th September, 1949, is sent herewith to the Advocate-General Madras. It is considered that the story attracts the operation of section 4(1)(d) of the Indian Press (Emergency Powers) Act, 1931. The Advocate-General is requested to offer his opinion as to whether action under the Indian Press (Emergency Powers) Act, 1931, can be taken in this case.

/True Copy/

No. 52.

O P I N I O N.

Sub: Newspapers and periodcals - "Jyoti", a Telugu fortnightly of "enali - Issue dated 10th Sept. 1949 - Objectionable.

Ref: Memorandum No. 3234/49-3, dated 15-11-1949, Public (General-A) Department.

In view of the decision of the Sup Special Branch of the Madras High Court, reported in (1948) 2 M.L.J. 165 - A.I.R. 1948 Mad. 326, I do not think the article in question can be said to offend section 4(1)(d) of the Indian Press (Emergency Powers) Act, 1931. The article no doubt attributes certain atrocious acts to the Police but there is no suggestion that these acts were done with the sanction or approval of the Government. In the absence of allegations suggestion of improper acts on the part of the Government, it cannot be said that the article brings or attempts to bring into hatred or contempt or excites or attempts to excite disaffection towards the Government. I am, therefore, of opinion that action cannot be taken in this case under the Indian Press (Emergency Powers) Act, 1931.

/True Copy/

No. 51.

O P I N I O N.

Sub: Criminal Justice - Appeal Against acquittal - Nellore S.C. No. 24/49 - Application.

Ref: Memorandum No. 11034 D/49-2 dated 24-11-49 Home Department.

I find it difficult to give a confident opinion that an apreal against acquittal is "likely to be successful" for two reasons (1) the natural reluctance of the High Court to interfere with an acquital in any case and (2) the opinion of the Public Prosecutor, who is handling such cases every day and whose view is therefore entitle to considerable weight. But, what strikes me is that this is possibly one of those cases in which an appeal ought to be filed in the public interest.

It has to be observed in the first instance that the judgment of the learned Sessions Judge is unsatisfactory. He has made much of the discrepancies inthe oral evidence which do no appear to be very material and do not affect the truth of the prosecuton case considered broadly. That Venku Reddi was brutally attacked on the head and done to death is an outstanding fact. Though the injury on his head has been described an an incised wound in the inquest report held within a few hours after the murder, and the Doctor who conducted the post mortem a day later described it otherwise, it is not such a variation or discrepancy as to justify the criticism of the Sessions Judge that there has been an attempt to concoct a false case. There has not been sufficient interval of time to concoct anything as the Police officials were on the scene in a few hours The prosecution witnesses who were eye-witnesses to the occurrence must have been too excited, with a deed body in their midst and a severely injured person in addition who had to be attended to immediately, to think of spinning out a story. In my opinion, the learned Sessions Judge has attached undue importance

to the evidence of D.W. 1 who did not see either the dead body or the weapon with which the mortal blow had been dealt with. The alibi of A2 as spoken to by C.W.1. is not destructive of the prosecution case as the is only 10 miles and there is evidence that a car was waiting in the village for A2's use. A2 could very well have got into it and reached Nellore in half an hour with a view to establish an alibi. A.W.1 is not definite about the time of A2's 2nd visit to him. He places it between 1 and 2 p.m. and the time of occurrence noted s as about 1-15 p.m. cannot be taken as very exact. Thea alibit of two other accused cannot to said to have been satisfactorily established. There has been no delay in seaing informations of the occurrance to the authorities The learned Judge has himself found that there was ill feeling between the two factions in the village and very little provocation is required in the community to which the accused belong to make them commit desterdly crimes. Independent evidence cannot be manufactured where it is not available and the learned Judge's criti cism of the prosecution case on the ground that there is no independent evidence is not just.

Having regard to the fact that a hoinous crime has been committed in broad day light and information of it has been given to the authorities immediately implicating the accused, I think the prosecution may be said to have made out its case and in the interests of justice, an appeal, it seems to me, may be filed as advised by the Collector and the local Public Prosecutor.

M A D R A S
8th Dec.49.

K. Rajah Iyer.
ADVOCATE - GENERAL.

/True Copy/

Sd. H.M. Small
GOVERNMENT SOLICITOR.

No. 54 (Confidential).

O P I N I O N.

Sub: Criminal Justice - Alloged illegal detention by police - Enquiry by Dist. Judge - Coimbatore - Ordered by the High Court - Request for interim say of enquiry and reference to a full Bench.

Ref: Memorandum No. 125694. D/48-2 dated the 8th December 1949, Home Department.

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K. Rajah Iyer. A.G. I have had talks with Honourable the Law Minster on the subject matter of the letter; and also with the Deputy Inspector General o Police, Coimbatore, Mr. A.S. Sivakaminathan, the A.P.M. Madras had also been to Coimbatore on the 19th instant and the needful has been done in consultation with me. There is therefore no need for filing an application in the High Court for revision of the order of the District Judge, Coimbatore or for stay of proceedings.

M A D R A S.
22-12-1949.

No. 55 dated 23-12-49.

O P I N I O N S

Sub: Courts - High Court, Madras - Abolition of the original side Jurisdiction in the city and the substitution of a District Court instead - Proposal.

Ref: Memorandum No. 49161 E/47-42, dated 29-11-49, Home Department.

K. Rajah Iyer, A.G. Since "Constitution and Organisation of the High Courts" will cease to be a Provincial subject after the New Constitution comes into force, the provincial Legislature will not be competent under the new set up to interfere with the jurisdiction exercised by the High Court on the original side. The jurisdiction which is now vested in the High Court is preserved under section 225 of the Constitution Act and only the appropriate Legislature which is the parliament can, by legislation, interfere with it. The opinion I had previously expressed has therefore to be modified to this extent in view of the change in the law.

But the Provincial Government can by appropriate legislation establish a Sub-Court of District Court even with unlimited jurisdiction as this is a subject falling under the head of "Administration of Justice" and "Constitution and organisation of Court other than Supreme Court and High Courts" - Cf. 51 Bom. L.R. 56. Such a court will only be a court of concurrent jurisdiction and cannot be said to oust or exclude the jurisdiction otherwise possessed by the High Court and some provision similar to section 16 of the Madras City Civil Courts Act might be enacted to discourage suits in the High Court.

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No. 56/23-12-49.

O P I N I O N.

Sub: Acts and Rules - Madras Commercial Crops Markets Act - Storage of groundnut - Taking out licences under the Madras District Municipalities Act, 1920 and the Madras Local Boards Act, 1920.

K. Rajah Iyer (A.G.). It is not possible to hold that the licensing provision in section 4 of the Madras Commercial Crops Markets Act, 1933(Act XX of 1933) repeals by implication the licensing provisions contained in the Madras Local Boards Act or the District Municipalities Act. It is a well settled rule of construction that a later statute can be said to impliedly repeal an earlier one, only if the provision in the former is "clearly and indisputably contradictory and contrary to the former Act in the very matter and the repugnancy is such that the two Acts cannot be reconciled" (Flanagan W haw. 1920(3) K.B. 96 p.101 per Bankes L.J.) "A repeal by implication is only effected when the provisons of a latter enactment are so inconsistant with or repugnant to the provisions of an earlier one, that the two cannot stand together, in which case, the maxim "leges posteriores contraries abrogant" applies," per Scrutton L.H. in Kutner V. Philips; (1891) 1 Q.B. 267 at 271 and 272. Where the objects of the two enactments are not identical, both will have to be given effect to. Eaxwell on "Interpretation of Statutes" 9th Edn. PP. 175 and 176; The object of Act XX of 1933 is protection and advancement of commercial interests while the object of the District Municipalities and Local Boards Act is obviously sanitary and safeguarding of pulic health. There is therefore not only no inconsistency betwen the two enactments, but the obect would appear to be that both should be given effect to.

The genenal exemption under section 244 of the Madras District Municipalities Act, 1920, cannot apply to licences under section 4 of Act XX 1933. In terms it exempts only buildings in the occupation of market

market committees established under section 5 of the Act.